

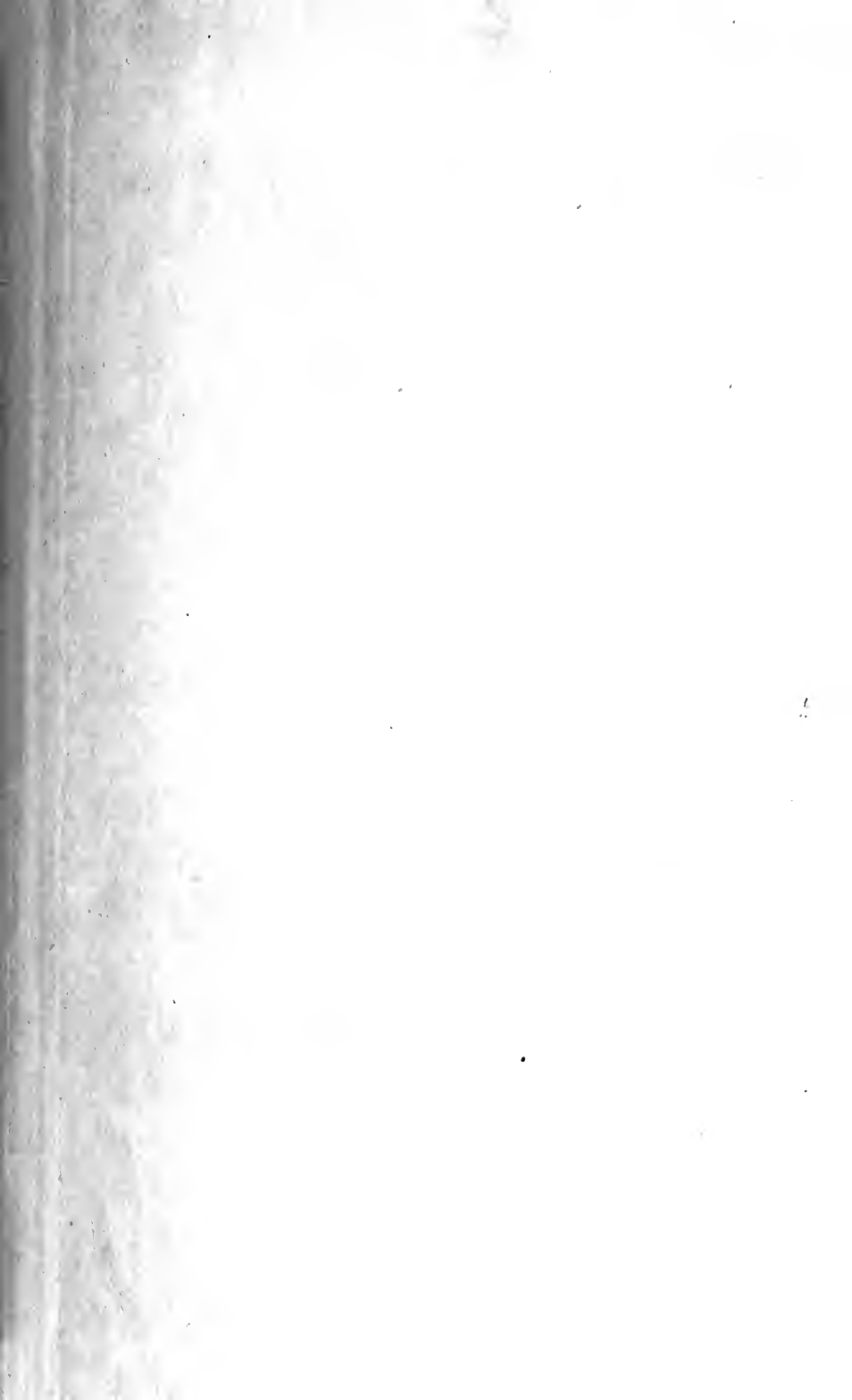
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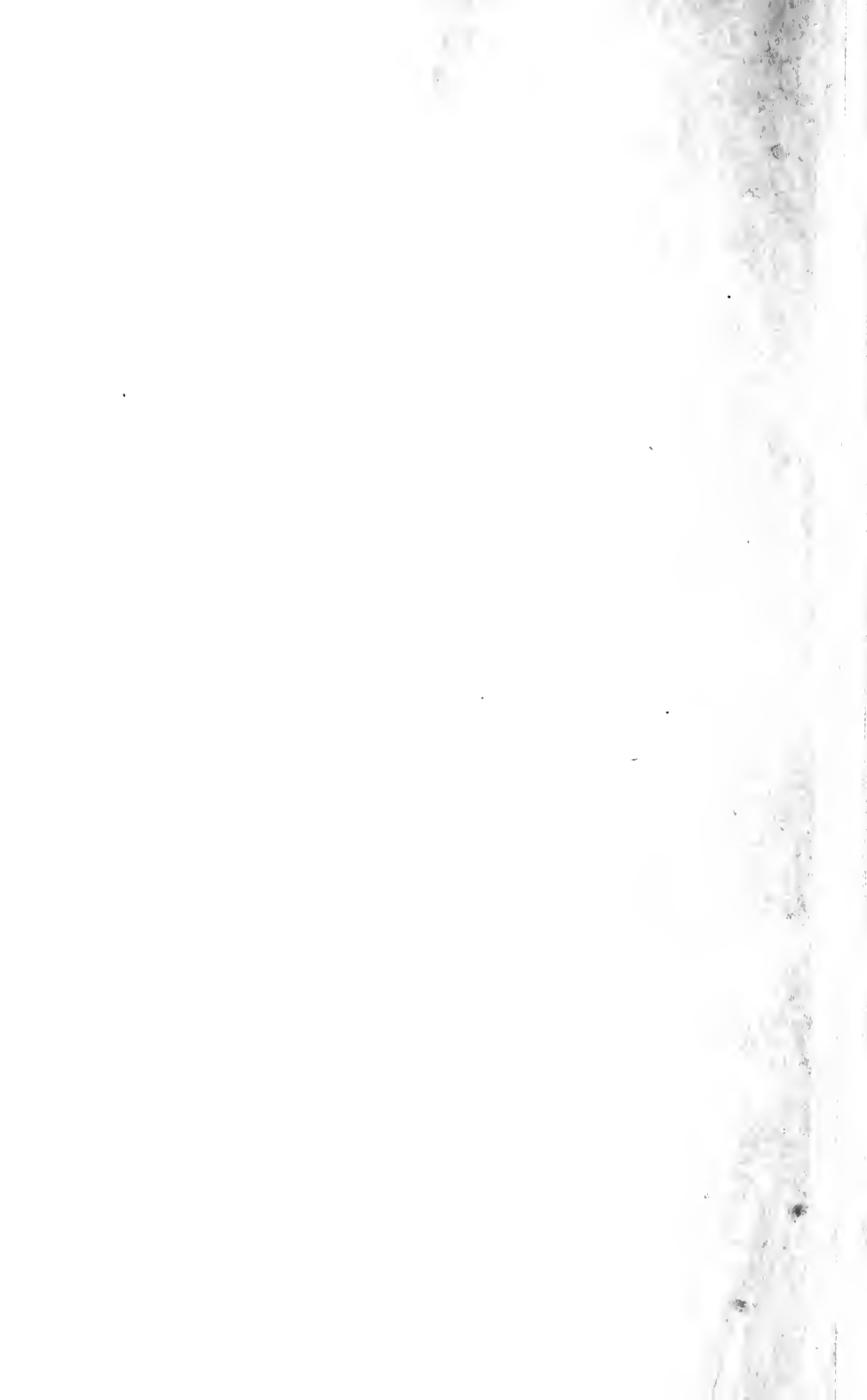
No. 118634

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No. 10380

United States *Vol 2334*
Circuit Court of Appeals
For the Ninth Circuit.

CARSON AND TAHOE LUMBER AND FLUM-
ING CO., a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court
of the United States

FILED

JUL - 1 1943

PAUL P. O'BRIEN,
CLERK

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No. 10380

United States
Circuit Court of Appeals
For the Ninth Circuit.

CARSON AND TAHOE LUMBER AND FLUM-
ING CO., a corporation,

Petitioner,

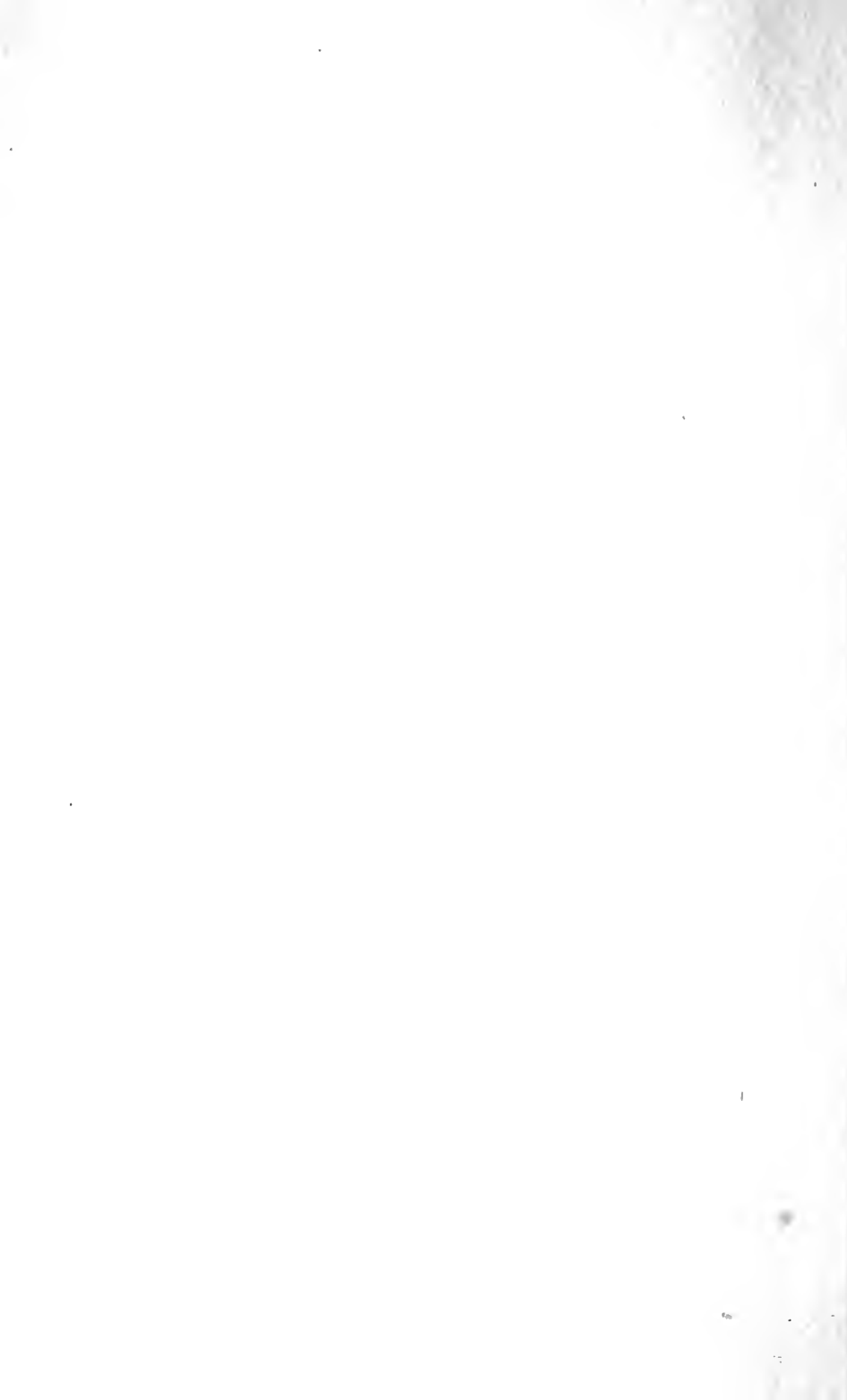
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Transcript of the Record

Upon Petition to Review a Decision of the Tax Court
of the United States



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

For Taxpayer:

A. W. Helvern, Esq.,
Llewellyn A. Luce, Esq.,
George H. Koster, Esq.

For Comm'r.:

Arthur Murray, Esq.

Docket No. 103735

CARSON AND TAHOE LUMBER AND FLUM-
ING COMPANY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1940

- Jul. 8—Petition received and filed. Taxpayer notified. Fee paid.
- " 8—Copy of petition served on General Counsel.
- Aug. 19—Answer filed by General Counsel.
- " 19—Request for hearing in San Francisco, Calif. filed by General Counsel.
- " 28—Notice issued placing proceeding on San Francisco calendar.
- Answer and request served.

1941

- Mar. 13—Motion for leave to file amended answer, amended answer lodged, filed by General Counsel.
- " 17—Motion granted.
- Apr. 8—Hearing set June 16, 1941 at San Francisco, Calif.
- " 14—Reply to amended answer filed by taxpayer. 4/14/41 copy served.
- Jun. 3—Application for subpoena to Mr. Fred Allerman and Allen McFaul filed by General Counsel. 6/3/41 subpoenas (2) issued.
- " 3—Application for subpoena duces tecum to H. R. Jepsen, Wm. D. Park, Richard Kirman, Sr. and J. B. Howell filed by General Counsel. 6/3/41 subpoenas (4) issued.
- " 25-26—Hearing had before Mr. Kern on the merits. Submitted. Respondent granted 10 days to amend. Briefs due August 20, 1941—replies September 19, 1941.
- Jul. 8—Transcript of hearing of 6/25/41 filed.
- " 8—Transcript of hearing of 6/26/41 filed.
- Aug. 19—Brief filed by taxpayer.
- " 20—Brief filed by General Counsel.
- " 21—Copy of brief served on General Counsel.
- " 28—Motion for permission to substitute the attached page 33 of respondent's brief filed by General Counsel. 9/3/41 granted.

1941

Sep. 16—Reply brief filed by taxpayer. 9/16/41
copy served.

" 18—Reply brief filed by General Counsel.

1942

Jun. 23—Memorandum findings of fact and opinion rendered, Kern, #16.

Decision will be entered under Rule 50.
6/23/42 copy served.

Jul. 29—Computation of deficiency filed by General Counsel.

Aug. 1—Hearing set Sept. 2, 1942 on settlement.

" 31—Consent to settlement filed by taxpayer.

Sep. 1—Decision entered, Kern, Div. 16.

Nov. 24—Motion to fix amount of appeal bond in the sum of \$21,500.00 filed by taxpayer.
11/25/42 granted. [1*]

" 24—Notice of appearance of Llewellyn A. Luce as counsel filed.

" 24—Notice of appearance of George H. Koster as counsel filed.

" 25—Supersedeas bond in the amount of \$21,500.00 approved and ordered filed.

" 27—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.

" 27—Notice of filing petition for review filed by taxpayer with proof of service thereon.

*Page numbering appearing at top of page of original certified Transcript of Record.

1943

- Jan. 6—Certified copy of order from the 9th Circuit extending the time to March 7, 1943 to complete and transmit the record filed.
- Feb. 20—Certified copy of order from the 9th Circuit directing transmission of original exhibits; that said exhibits remain in the custody of the Clerk of The Tax Court of the United States until 15 days before this cause on review is set for argument in this Court; that upon direction and cost of counsel for petitioner on review said exhibits be transmitted to the Clerk of this court filed.
- " 24—Praecipe for record filed by taxpayer with proof of service thereon. No counter praecipe will be filed. [2]

United States Board of Tax Appeals

Docket No. 103735

CARSON AND TAIHOE LUMBER AND FLUM-
ING COMPANY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REDETERMINATION OF
DEFICIENCY

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, (IRA :90-DGK) dated April 11, 1940, and as a basis for its proceeding alleges as follows:

1. The petitioner is a corporation organized and existing under provision of the laws of Nevada, with its place of business at Carson City, Ormsby County, Nevada.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on April 11, 1940, as the petitioner believes.

3. The taxes in controversy are income taxes for the calendar year 1938, in the amount of \$6,-138.55. The deficiency disclosed by the notice of deficiency is in the amount of \$4,844.10. [3]

4. The determination of the tax, as set forth in the said notice of deficiency, is based upon the following errors:

The Commissioner erred in determining that the fair market value at March 1, 1913 of certain of the petitioner's lands sold during the taxable year was \$169,940.40.

5. The facts upon which the petitioner relies as the basis for this proceeding are as follows:

The petitioner was organized as a corporation under the laws of Nevada, November 24, 1873, and received in exchange for the issuance of its shares of capital stock certain lands in Nevada and California. Certain of the said lands were forested by standing merchantable timber, and lumbering operations with respect to such lands were undertaken and carried on by the corporation up to about the year 1896, at which time practically all available merchantable timber had been removed and lumbering operations were discontinued.

The costs of the said lands to the company's stockholders prior to its incorporation and the fair market value of the lands at the time paid into the company in 1873 are not available in the records of the petitioner.

As at March 1, 1913 petitioner was the owner of approximately 44,400 acres of the said land located principally in Nevada and in the vicinity of Lake Tahoe and [4] *and* having a shore frontage upon the said lake of approximately 75,800 feet.

On or about April 11, 1912 the petitioner entered into an agreement with its president, W. S. Bliss, whereunder the president agreed to undertake the sale of any and all of the various parcels of land for a consideration or commission of ten percent

of a selling price based upon the estimated fair value of the lands.

The president, W. S. Bliss, had prepared a detailed appraisement schedule describing and valuing the various parcels of land by block numbers. In arriving at the values, among other things the president gave consideration to foot frontage of the land upon the shores of Lake Tahoe.

On April 11, 1912 petitioner also entered into an option agreement with J. B. Webster, L. B. Edwards and C. M. Wooster, second parties, covering the sale of the lands owned by the company in the aggregate amount of 44,403 acres, the selling price being based upon the said estimate and appraisement of the various parcels of land as made by W. S. Bliss. The said option and agreement called for an expenditure within one year by the second parties of at least \$10,000 for advertising, exploiting and selling the property, and the cash purchase by the second parties of at least 10 percent of the land. None of the lands were so purchased by the second parties during the first year of the agreement, and thereby they forfeited their rights under the option. [5] The second parties again applied in 1913 for a renewal of the said option agreement, but it was refused by the petitioner.

During the years from 1910 to 1913 inclusive, certain sales of the lands were made by petitioner, and other sales were made by other owners of lands adjacent to and comparable in value with petitioner's lands. The amounts realized by the

sellers as the sale price of the said lands so sold represented an increase of 24.24 percent over the fair value placed upon the said lands by W. S. Bliss in his estimate and appraisement of April 11, 1912.

During the taxable year 1938 with respect to which this controversy arises, petitioner sold to George Whittell certain of its said lands of a total acreage of approximately 11,400 acres, and with respect to which the value, based on the said estimate of W. S. Bliss, was \$155,014. Certain improvements upon the land so conveyed, together with certain personal property also sold, cost the petitioner \$30,428.25, which added to the estimated fair market value of the land of \$155,014, amounted to \$185,442.25.

Petitioner received from the purchaser \$300,433.27 as the sale price of the said property, and using the said \$185,442.25 as a basis for tax purposes, reported in its income tax return a capital gain thereon of \$114,991.02 (\$300,433.27 minus \$185,442.25).

Upon examination of petitioner's return by a [6] Government Internal Revenue Agent, the said value of \$155,014 (claimed by petitioner as March 1, 1913 value) was reduced by \$15,501.85 to \$139,512.15, thus increasing the capital gain reported in petitioner's return by the amount of \$15,501.85. The said value as reduced by the Revenue Agent has been used by the respondent in the notice of deficiency, and the deficiency claimed, to the extent of \$2,557.80, arises by reason of the said deduction and disallowance.

Certain other lands were also sold during the taxable year by the petitioner to the United States Government at a loss of \$13,841, based on estimated March 1, 1913 value. Loss or gain upon the basis of cost with respect to this sale cannot be definitely determined, and the loss of \$13,841, based on March 1, 1913 value, was held by the respondent not to be allowable under Section 113(a) and Section 113(b) of the Revenue Act of 1938. There is no issue herein with respect to such disallowance.

The issue in this case arises by reason of the fact that the respondent, by his said disallowance of \$15,501.85, of March 1, 1913 value claimed in petitioner's return, has taken the position that the estimated fair value of the lands sold to George Whittell, as determined by petitioner's president, W. S. Bliss, and used as being March 1, 1913 value, should be reduced by ten percent.

Petitioner herein contends that not only is the respondent in error in reducing by ten percent the basis [7] claimed in the return but that petitioner is entitled to increase its basis to 124 percent of the values estimated by W. S. Bliss, based upon sale prices actually realized for petitioner's land and similar adjacent lands during the years 1910 to 1913 inclusive. The use of this basis has the effect of reducing the tax liability by \$6,138.55, and if sustained will entitle the petitioner to refund of \$1,254.45.

6. The petitioner prays for relief from the deficiency asserted by the respondent in each of the following particulars:

(a) The petitioner prays the Board to find that it is entitled to a March 1, 1913 value for the land sold to George Whittell in the amount of at least \$192,217.36.

(b) The petitioner prays the Board to find that the petitioner is entitled to refund of taxes overpaid in the amount of \$1,254.45.

(c) The petitioner prays for such other and further relief as to the Board may seem equitable and proper. [8]

Wherefore, petitioner prays that the Board may hear this proceeding and make a determination of the issue.

A. W. HELVERN

Counsel for Petitioner

485 California Street

San Francisco, California

State of California

City & County of San Francisco

Duncan A. McLeod, being duly sworn, says that he is the President of Carson and Tahoe Lumber and Fluming Company, the petitioner named herein, that he has read the foregoing petition and is familiar with the statements contained therein, and that the facts stated are true.

DUNCAN A. McLEOD

Subscribed and sworn to before me this 29th day of June 1940.

FLORA HALL

Notary Public [9]

EXHIBIT A

(Copy)

SN-IT-1

Treasury Department

Internal Revenue Service

433 Federal Office Building

San Francisco, California

Office of

Internal Revenue

Agent in Charge

San Francisco Division

IRA :90-D GK

April 11, 1940

Carson & Tahoe Lumber & Fluming Co.,

Carson City, Nevada

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1938 discloses a deficiency of \$4,-844.10 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and for-

ward it to the Internal Revenue Agent in Charge, San Francisco, California for the attention of Conference Section. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner

By (signed)

F. M. Harless

Internal Revenue Agent in
Charge

Enclosures:

Statement

Form of waiver [10]

STATEMENT

San Francisco

IRA :90-D

GK

Carson & Tahoe Lumber & Fluming Co.,
Carson City, Nevada

Tax Liability for the Taxable Year Ended December 31, 1938

	Liability	Assessed	Deficiency
Income Tax	\$14,696.71	\$ 9,852.61	\$ 4,844.10

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated December 22, 1939, to which no protest has been received.

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return.....		\$ 59,712.78
Unallowable deductions and additional income		
(a) Additional capital gain.....	\$ 29,342.85	
(b) Additional interest income.....	15.37	29,358.22
		<hr/>
Net income adjusted		\$ 89,071.00
		<hr/> <hr/>

EXPLANATION OF ADJUSTMENTS

(a) You reported in your return a net gain of \$101,150.02 from sales of land. This amount included a gain of \$114,991.02 on sales to George Whittell and a loss of \$13,841.00 on sales to the United States Forest Service.

The taxable net gain on these transactions is recomputed below at \$130,492.87, or \$29,342.85 in excess of the amount reported. This difference is caused by the correction of errors in your computation of the cost or other basis of the properties sold in 1938.

The adjusted cost or other basis of the properties sold to George Whittell is held to be \$169,940.40, while you reported a basis of \$185,442.25. [11]

No gain or loss is recognized on the sale of land to the United States Forest Service, from which you reported a loss of \$13,841.00. The March 1, 1913 value of this land, as adjusted, is held to be \$18,504.00. As this value exceeds the sales price of \$6,720.00 no taxable gain is realized under the provisions of section 113(a) (14) of the Revenue Act of 1938. The cost of the land is held to have

been recovered fully in earlier years by allowances for depletion. Consequently, no loss is sustained under the provisions of sections 113(a) and 113(b) of the Revenue Act of 1938.

Description	Sales Price	Adjusted cost or other basis	Gain
Land: Block 4.....		\$ 5,119.20	
5.....		9,225.00	
6.....		11,770.65	
7.....		16,985.70	
8.....		14,736.60	
9.....		8,685.00	
10.....		52,614.00	
11.....		20,376.00	
Camp ground im- provements		28,475.23	
Merchandise		1,519.75	
Unexpired insurance		433.27	
Total, sold to George Whittell	\$300,433.27	\$169,940.40	\$130,492.87

(b) You failed to report in your return interest in the amount of \$15.37 received during the year on a refund of income taxes. This amount is held to constitute taxable income. [12]

COMPUTATION OF EXCESS-PROFITS TAX

Value of capital stock as declared in the capital stock tax return for the year ended June 30, 1938	\$1,000,000.00
Net income for excess-profits tax computation.....	89,071.00
Less:	
10% of capital stock declared value.....	100,000.00
Net income subject to excess-profits tax.....	\$ None

COMPUTATION OF INCOME TAX

Net income for excess-profits tax computation.....	\$ 89,071.00
Less:	
Excess-profits tax	None
Net income	89,071.00
Less:	
Interest on obligations of the United States, etc.	None
Adjusted net income	\$ 89,071.00
Tentative tax at 19 percent.....	\$ 16,923.49
Less:	
2½ per cent of the dividends paid credit, (not to exceed 2½% of adjusted net income).....	2,226.78
Total income tax assessable.....	\$ 14,696.71
Income tax assessed:	
Original, account No. 40101, District of Nevada	9,852.61
Deficiency of income tax.....	\$ 4,844.10

[Endorsed]: U.S.B.T.A. Filed July 8, 1940.

[13]

[Title of Board and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits that the taxes in controversy are income taxes for the calendar year 1938 and that the deficiency disclosed by the notice of deficiency is in the amount of \$4,844.10; denies all other allegations contained in paragraph 3 of the petition.

4. Denies that the determination of the tax as set forth in the said notice of deficiency is based upon errors as alleged in paragraph 4 of the petition. [14]

5. Admits that the petitioner was organized as a corporation under the laws of Nevada; that during the taxable year 1938 petitioner sold certain of its lands for \$300,433.27; that the petitioner, using \$185,442.25 as a basis for said lands, reported a capital gain of \$114,991.02 from said sale on its 1938 income tax return; that upon an examination of petitioner's 1938 return by a Government Internal Revenue agent, said basis was reduced by \$15,501.85, and the capital gain reported by the petitioner increased in a like amount; that the issue in this case arises by reason of the said adjustments; for lack of information, and for other reasons, denies all other allegations contained in paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's

determination be approved and the petitioner's appeal denied.

(Signed) J. P. WENCHEL,

TMM

Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

Alva C. Baird,

T. M. Mather,

Arthur L. Murray,

Special Attorneys,

Bureau of Internal Revenue.

ALM/ge 8-9-40

[Endorsed]: U.S.B.T.A. Filed Aug. 19, 1940.

[15]

[Title of Board and Cause.]

AMENDED ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for amended answer to the petition filed by the above-named petitioner, admits, denies and alleges as follows:

1. Admits the allegations contained in paragraph 1 of the petition.
2. Admits the allegations contained in paragraph 2 of the petition.
3. Admits that the deficiency disclosed by the notice of deficiency is in the amount of \$4,844.10,

but denies all other allegations contained in paragraph 3 of the petition. Alleges that the tax here in controversy is income tax for the calendar year 1938, in the amount of \$17,963.61. [16]

4. Admits that the Commissioner erred in determining that the fair market value at March 1, 1913 of certain of petitioner's lands together with certain improvements and personal property, which were sold to George Whittell during the taxable year, was \$169,940.40 and alleges (1) that the Commissioner erred in not determining that the fair market value of said lands as of March 1, 1913, plus the said improvements and personal property, was \$90,428.25, and (2) that the Commissioner erred in not determining that the 1938 taxable net income of the petitioner was \$168,583.15, instead of \$89,071.00, the amount shown in the deficiency notice.

5. Admits that the petitioner was organized as a corporation under the laws of Nevada, November 24, 1873, and received, in exchange for the issuance of its shares of capital stock, certain lands in Nevada and California; that certain of the said lands were forested by standing merchantable timber; that lumber operations with respect to such lands were undertaken and carried on by the corporation up to about the year 1896, at which time practically all available merchantable timber had been removed and lumbering operations were discontinued; that the costs of the said lands to the company's stockholders prior to its incorporation in 1873 are not available in the records of the petitioner; that on or about March 1, 1913, the petitioner was the owner

of approximately 44,400 acres of the said land located principally in Nevada and in the vicinity of Lake Tahoe and having a shore frontage upon the said lake of approximately 75,800 feet; that during the taxable year 1938, with respect to which this controversy arises, [17] petitioner sold to George Whittell certain of its lands and certain improvements upon the land, together with certain personal property; that said improvements and personal property had a 1938 adjusted cost basis of \$30,428.25 to the petitioner; that petitioner received from the said purchaser \$300,433.27 as the sale price of the said property and reported in its income tax return a capital gain thereon of \$114,991.02; that upon an examination of petitioner's return by a Government Internal Revenue Agent the value of the said lands, exclusive of improvements, claimed by the petitioner as the March 1, 1913, value thereof, or \$155,014.00, was reduced to \$139,512.15 thus increasing the capital gain from said sale, as reported in petitioner's return for 1938, in the sum of \$15,501.85; that certain other lands were sold by the petitioner during the taxable year to the United States Government but that there is no issue herein with respect thereto; denies all other allegations contained in paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

7. Further answering, and by way of setting forth allegations to support his claim for 1938 in-

creased deficiencies in income tax, the respondent alleges as follows: [18]

(a) During 1938 the petitioner sold to George Whittell a certain tract of land located in Douglas County, Nevada, together with certain improvements thereon and certain personal property, for a total price of \$300,433.27. Said tract of land, which consists of approximately 11,200 acres, was owned by the petitioner since long prior to 1913, and is described as follows:

DOUGLAS COUNTY, NEVADA

Township 13 North, Range 18 East, M. D. B. & M.

- Section 1: All
- Section 2: $S\frac{1}{2}$ of Lot 1 of $NW\frac{1}{4}$; $SW\frac{1}{4}$; $SE\frac{1}{4}$; Lots 1 & 2 of $NE\frac{1}{4}$
- Section 3: Lots 5, 6 and 7 of $SW\frac{1}{4}$; $SE\frac{1}{4}$; $NE\frac{1}{4}$ of $SW\frac{1}{4}$
- Section 10: Lots 1 and 2; $NE\frac{1}{4}$; $N\frac{1}{2}$ of $SE\frac{1}{4}$
- Section 11: All
- Section 12: All
- Section 13: All
- Section 14: $N\frac{1}{2}$; $SW\frac{1}{4}$; $N\frac{1}{2}$ of $SE\frac{1}{4}$; $SW\frac{1}{4}$ of $SE\frac{1}{4}$
- Section 21: Lot 1
- Section 22: Lots 1 and 2 of $NW\frac{1}{4}$
- Section 23: $NE\frac{1}{4}$ of $NW\frac{1}{4}$; $W\frac{1}{2}$ of $NE\frac{1}{4}$; $NW\frac{1}{4}$ of $SE\frac{1}{4}$
- Section 24: $N\frac{1}{2}$ of $NE\frac{1}{4}$; $NW\frac{1}{4}$; $NW\frac{1}{4}$ of $SW\frac{1}{4}$

Township 14 North, Range 18 East, M. D. B. & M.

- Section 22: Lots 2, 3 and 4; $E\frac{1}{2}$ of $SE\frac{1}{4}$
- Section 23: $N\frac{1}{2}$; $SW\frac{1}{4}$ of $SW\frac{1}{4}$; $E\frac{1}{2}$ of $SW\frac{1}{4}$; $SE\frac{1}{4}$
- Section 24: All
- Section 25: All
- Section 26: All
- Section 27: South 100 ft. of Lot 2 & South 100 ft. of $S\frac{1}{2}$ of $NE\frac{1}{4}$; Lot 3 of $SW\frac{1}{4}$
- Section 35: $E\frac{1}{2}$; $NE\frac{1}{4}$ of $NW\frac{1}{4}$
- Section 36: $N\frac{1}{2}$; $SW\frac{1}{4}$; $W\frac{1}{2}$ of $SE\frac{1}{4}$

Township 14 North, Range 19 East, M. D. B. & M.

Section 7: All

Section 8: All

Section 9: $W\frac{1}{2}$ of $W\frac{1}{2}$

Section 18: All

Section 19: $N\frac{1}{2}$; $W\frac{1}{2}$ of $SW\frac{1}{4}$

Section 20: $W\frac{1}{2}$ of $NW\frac{1}{4}$

Section 30: Lot 2 of $NW\frac{1}{4}$; Lot 2 of $SW\frac{1}{4}$

Section 31: Lot 2 of $NW\frac{1}{4}$; $S\frac{1}{2}$ of Lot 1 of $NW\frac{1}{4}$

[19]

On its Federal income tax return for 1938 the petitioner claimed that the fair market value of said tract of land, as of March 1, 1913, exclusive of improvements, was \$155,014.00.

(b) In determining the deficiency shown in the deficiency notice the respondent erroneously determined that the fair market value of said land as of March 1, 1913, exclusive of improvements, was \$139,512.15, whereas in truth and in fact the fair market value of said land as of March 1, 1913, exclusive of improvements, was not in excess of \$60,000.00.

(c) Upon the sale of said land and other property to George Whittell in 1938, for \$300,433.27, the land, exclusive of improvements, having a fair market value as of March 1, 1913, of \$60,000.00, the petitioner realized a taxable 1938 gain on said transaction in the amount of \$210,005.02, instead of \$130,492.87 as shown in the deficiency notice, which fact shows that the petitioner actually realized taxable 1938 net income in the amount of \$168,583.15, instead of \$89,071.00 as shown in the deficiency notice.

(d) In the notice of deficiency the respondent

understated the 1938 income tax liability of petitioner by the amount of \$13,119.15. Respondent hereby asserts claim for said amount of increased deficiency in income tax alleged to be due, or any part thereof determined by this Board to be due.

Wherefore, it is prayed that petitioner's appeal be denied and that the Board redetermine the amount of petitioner's 1938 [20] income tax deficiency to be \$17,963.61, which amount is \$13,119.51 in excess of the income tax deficiency set forth in the notice of deficiency, claim for which increased deficiency is hereby asserted.

(Signed) J. P. WENCHEL,
T.M.M.

Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

Alva C. Baird,
Division Counsel.

T. M. Mather,

Arthur L. Murray,

Special Attorneys,

Bureau of Internal Revenue.

L

ALM:emb 3-6-41

[Endorsed]: U.S.B.T.A. Lodged Mar. 13, 1941.
Filed March 17, 1941. [21]

[Title of Board and Cause.]

REPLY TO AMENDED ANSWER

Comes now Carson and Tahoe Lumber and Flum-

ing Company, petitioner above named, by its attorney, A. W. Helvern, and for reply to the amended answer filed by the above named respondent, alleges and makes denial of the respondent's allegations with respect to respondent's claim for affirmative relief, and states the facts upon which the petitioner relies as a defense as follows:

1. Re-affirms the allegations contained in paragraph 1 of the petition, admitted by the respondent in his amended answer.

2. Re-affirms the allegations contained in paragraph 2 of the petition, admitted by the respondent in his amended answer.

3. Admits that the tax here in controversy is income tax for the year 1938 in the amount of \$17,963.61, but [22] re-affirms all other allegations contained in paragraph 3 of the petition.

4. Re-affirms its allegation contained in paragraph 4 of the petition, admitted by the respondent in his amended answer, with respect to certain lands and improvements sold to George Whittell, but denies respondent's allegations (1) that the fair market value of the said lands as at March 1, 1913 plus the said improvements and personal property was \$90,528.25, and (2) that the Commissioner erred in not determining that the 1938 taxable net income of the petitioner was \$168,583.15.

7(a) Admits that during the year 1938 the petitioner sold to George Whittell a certain tract of land located in Douglas County, Nevada, together with certain improvements, and personal property, for a total price of \$300,433.27, which said tract was owned by the petitioner since prior to 1913. Fur-

ther admits that in its federal income tax return for 1938 the petitioner claimed that the fair market value of said tract of land as of March 1, 1913, exclusive of improvements, was \$155,014.

(b) Admits that the respondent erroneously determined that the fair market value of the said land at March 1, 1913, exclusive of improvements, was \$139,512.15, but denies that the fair market value of the said land as at March 1, 1913, exclusive of improvements was not in excess of \$60,000. [23]

(c) Denies that upon the sale of the said land and other property to George Whittell in 1938 for \$300,433.27 that petitioner realized a taxable gain in the amount of \$210,005.02, or any taxable gain in excess of \$77,787.66.

(d) Denies that in the notice of deficiency the respondent understated the 1938 income tax liability of the petitioner by the amount of \$13,119.15, but alleges that there is no deficiency, and that petitioner is entitled to refund of taxes overpaid in the amount of \$1,254.45, on the basis of its allegations as set forth in the petition.

8. Further replying to respondent's amended answer, and by way of setting forth allegations upon which petitioner relies for defense and in support of its claim for refund, the petitioner alleges as follows:

(a) That the fair market value as of March 1, 1913, of said tract of land sold to George Whittell, exclusive of improvements, was \$192,217.36.

(b) That the said valuation of \$192,217.36 as of March 1, 1913 of the said land sold to George Whittell is supported by appraisal made by an expert

familiar with the valuation of the said land and similar lands in the vicinity as at March 1, 1913, and by proven sales of comparable lands out of the same tract and within the vicinity during the years 1910 and 1913, which said values petitioner is prepared to prove and will prove at the trial of this cause. [24]

Wherefore, it is prayed that the respondent's claim for affirmative relief, based upon new matter set forth in his amended answer, be denied and that the Board find that petitioner is entitled to a refund of taxes overpaid in the amount of \$1,254.45.

A. W. HELVERN

Attorney for Petitioner

485 California Street

San Francisco, California

Of counsel:

Helvern & Webster

[Endorsed]: U.S.B.T.A. Filed Apr. 14, 1941.

[25]

[Title of Board and Cause.]

A. W. Helvern, Esq.,

For the petitioner.

Arthur Murray, Esq.,

For the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

The respondent found a deficiency in petitioner's income tax of \$4,844.10 for the calendar year 1938.

The petitioner seeks a refund of \$1,254.45. The respondent in his amended answer asks that the deficiency be increased to \$17,963.61. The only question presented is the gain on sale in the taxable year of certain lands near Lake Tahoe in Nevada and this depends upon the [26] controverted question of the first of March, 1913, fair market value of these 11,187 acres. The facts are as follows:

FINDINGS OF FACT

Petitioner is a corporation and its address is Carson City, Nevada. It filed its income tax return for the taxable year with the collector of internal revenue for the District of Nevada.

In 1938 petitioner sold to George Whittell 11,187 acres of land on or near the eastern shore of Lake Tahoe in Douglas County, Nevada, with its improvements for \$300,000. Petitioner had owned these lands before March 1, 1913. Petitioner reported a sale price of \$300,433.27 (which included an item of \$433.27 for unexpired insurance), a 1913 value (including improvements, costing \$30,428.25, not here in dispute) of \$185,442.25, and a consequent capital gain of \$114,991.02. The respondent in his determination of deficiency reduced the 1913 value of the lands by \$15,501.85, and thus increased the capital gain by the same amount. By amended answer respondent alleges that the property in question had a 1913 value, exclusive of improvements, of \$60,000, as against the petitioner's claim of \$155,014.

The petitioner corporation was organized in 1873 and exchanged its capital stock for certain timber lands in Nevada and California, on and near Lake

Tahoe. The petitioner carried on a lumber and sawmill business until 1896, when practically all merchantable timber had been removed from its lands and the lumbering operations were discontinued. After 1898 land was the only asset the corporation had. In 1907 the capitalization of the petitioner corporation was decreased from \$2,080,000.00 to \$260,000.00. [27]

In 1912 and 1913 the petitioner owned approximately 44,000 acres of land in Nevada and California, all around Lake Tahoe, with about 75,000 shore feet on the Lake. Nearly all of the land on the Nevada side had lake frontage. The land in question was all located on the east side of Lake Tahoe in the State of Nevada.

In 1913 there was very little development on the Nevada side of the Lake. There was no road of any kind from Glenbrook, Nevada, north to the California line, until 1926, when the U. S. Forestry Service put in a narrow road. The road from the Nevada state line on the south northwards to Glenbrook, by way of Zephyr Cove, was poor; in 1912 and 1913 it was of sand and gravel, suitable only for horse-drawn vehicles. Even in 1928 it was rough, wide enough for only one vehicle and had sharp curves and poor distance-visibility. The Nevada side of the Lake was therefore not easily accessible in 1913. A railroad had been extended to Tahoe City, on the California side of the Lake, in 1902 or 1903 and development near there was fairly well advanced by 1912, although at that time the railroad was narrow gauged.

The topography of the Nevada side of the Lake was not as well suited for recreational purposes as that on the California side. The northwest and south sides of the Lake, which are in California, have relatively flat land extending back from the lake shore in all but a few cases from a quarter of a mile to two miles, and at the south end from six to eight miles. The east, or Nevada, side of the Lake has very little flat land except at two or three places. The climatic conditions are less favorable on the east side because of prevailing winds from the west, and there is less precipitation on that side. That portion of petitioner's land on the Nevada side of [28] the Lake, which adjoined the Lake, can not be said to have had any special value in 1913 because of its lake frontage, except as far as a half a mile back from the Lake in most portions and three quarters of a mile in a few.

About 1916, waterfront property on the west or California side of Lake Tahoe near Tahoe City was selling for from five to ten times as much as that on the east side of the Lake.

In 1912 petitioner gave an option to J. B. Brewster, L. B. Edwards and C. M. Wooster to purchase 44,403 acres of land belonging to it and to El Dorado Wood and Flume Co. for a total price of \$778,500. The option agreement was to last for five years but only on condition that the holders of the option would purchase 10 percent of the property the first year, 20 percent the second, 20 percent the third, 20 percent the fourth and 30 percent the fifth. At the end of the first year no purchases had been made pursuant to the option and the holders thereof asked

for an extension of the time. Petitioner in 1913 extended it for one month, but no purchases having been made, it was cancelled. The prices named in the option agreement represented were those which W. S. Bliss, its then president, felt in 1912 would be realized over a period of five years. In 1913 there was a financial depression throughout the country and a consequent reluctance on the part of people having money to make new commitments or investments. In that year and until 1920 there was little demand for the property of petitioner. Property values began to climb slowly until 1920 and after that year more rapidly.

This option agreement was executed because of the desire of the stockholders and trustees of petitioner to liquidate its property which was producing hardly enough income to pay its expenses. After the cancellation [28A] of the option certain stockholders urged the sale of property so that some distribution could be made to them. Few sales were made however and dissention arose between Bliss and the other officers and trustees. The latter believed that Bliss's ideas concerning the values of petitioner's lands were exaggerated, while Bliss believed that the prices at which the other officers were proposing to sell the land were too low. Finally, in 1928, after some litigation, Bliss resigned as an officer and trustee of petitioner and surrendered his stock in return for the conveyance to him of certain property.

During the period 1903 to 1923 the following sales were made of land located on the east side of Lake Tahoe in the State of Nevada:

Vendee	Date	No. of acres	Location	Price per acre
Joseph W. Hall.....	1903	8.58	Shore front (Skunk Harbor).....	\$ 1.25
Joseph W. Hall.....	1903	25.15	Shore front	1.25
Harry O. Comstock.....	1910	2	Shore front on southeastern side of Lake on Calif.-Nev. border (beach)....	500.00
Wm. McFaul	1911	160.00	Small part shore front (Marla Bay)....	1.25
W. F. Detert	1913	640	1¾ miles from shore (good timber land)	6.00
Harry O. Comstock (Vendor)	1915	2	Shore front on southeastern side of Lake on Calif.-Nev. border (beach)....	1,500.00
M. and R. Bigot.....	1917	80	Unknown	12.50
G. R. Cowgill	1919	40.00	½ mile from shore.....	6.00
Norman De Vaux	1920	40.00	¾ mile from shore.....	10.00
Chas. L. Fulstone	1920	1160	Unknown	4.28
Chas. L. Fulstone	1920	1634	Unknown	6.78
Eliz. M. Beatty (vendor)..	1921	153.00	Shore front (between Zephyr Cove and Glenbrook)	26.14
E. G. Schmeidel.....	1921	4⅔	Shorefront	764.59
Chas. L. Fulstone.....	1922	922	Unknown	5.75
Newhall	1922	290.67	Shorefront (between Skunk Harbor & Secret Harbor)	18.96
R. A. Hardy.....	1922	37.00	Shorefront (Zephyr Cove)	67.56
C. L. Fulstone.....	1923	416.00	Part shore front (Skyland)	21.63

[29]

During the period 1903 to 1923 appraisals were made incident to the settlement of estates of deceased owners of land located on the east side of Lake Tahoe in Nevada, as follows:

Owner	Date	No. of acres	Location	Value per acre
Estate of Duane Leroy Bliss	1910	80	1/4 mile from shore near Glenbrook.....	\$.50
Estate of Elizabeth T. Bliss	1921	80	1/4 mile from shore near Glenbrook.....	4.00
Estate of Duane Leroy Bliss	1910	227 1/2	Shore frone (on Zephyr Cove).....	2.50

[30]

Petitioner in its Federal capital stock tax return for the fiscal year ended June 30, 1916, which was signed and sworn to by W. S. Bliss, as president, on January 25, 1917, reported as the fair value of the 520 outstanding shares of its stock \$104,000.00, which was computed on the basis of an average value of approximately \$3.00 an acre for all the land owned by the petitioner. The return contains the following note:

This Company is the owner of 35,000 to 40,000 acres of land situate around Lake Tahoe, at an elevation of from 6300 to 9000 feet above sea level, which is rented for grazing purposes at the rate of from 5c to 7½c per acre per year. This income will not pay expenses.

In the last five years this Company has sold 640 acres, netting about \$5.00 per acre. Some of this land might answer for hotel sites, at a higher valuation, but would say as a whole it could not be sold for over \$3.00 per acre if at that. Consequently have written in paragraph 8—520 shares at \$200.00 per share, equal to \$104,000.00.

Petitioner in its Federal income and profits tax return for the calendar year 1918, which was signed and sworn to by W. S. Bliss, as president, on June 11, 1919, in answer to question No. 21, page 6, What was the fair value of the total capital stock of the corporation as determined in the last assessment of the capital stock tax? said "No market value. Assets consist entirely of lands; impossible to make definite estimate."

On its original Federal capital stock tax returns, for the years 1922, 1923, 1924 and 1925, the petitioner declared the fair value of its 520 outstanding shares of capital stock at \$102,949.95, \$92,964.00, \$72,123.00 and \$71,066.00, respectively. These declarations of value, if correlated with petitioner's admitted acreage for the several years, show the following: [31]

Year	Fair value reported for 520 shares	Value of Securities, cash, notes & accounts	Value assigned to land owned	Number of acres of land owned	Average value per acre
1922	\$102,949.95	\$29,504.95	\$73,445.00	31,512	\$2.33
1923	92,964.00	24,082.00	68,882.00	31,428	2.19
1924	72,123.00	33,410.00	38,713.00	28,769	1.35
1925	71,066.00	32,353.00	38,713.00	23,395	1.65

In answer to an inquiry from the Commissioner of Internal Revenue of August 5, 1926, with respect to petitioner's capital stock tax values for years 1919 to 1926, inclusive, the petitioner replied on September 16, 1926, (the letter signed by S. C. Bigelow, as secretary), in part as follows:

This Company was originally organized in 1873 to conduct a wood and lumber business, but for the past thirty years or more that portion of its business has been discontinued and it is now but a liquidating company, the limited rentals and other incidental receipts not even paying taxes and operating expenses, and there has been but a limited demand to purchase the property of the company. * * * The truth is—the property is worth just what the company can get for it; there has been but a limited demand for many years and there is a serious

question as to whether this liquidating company should pay a Capital Stock Tax, but we wish above all things to be fair, and we are therefore enclosing amended returns for the years 1923, 1924 and 1925 on basis of the capitalized value. We feel that the previous returns have been fair in view of the facts above recited, and should you agree, shall be pleased if you will cancel the enclosed returns; if you feel however, that the latter should be filed, we respectfully request that the returns previous to these be accepted as representative of a fair capitalized value. * * *

The 11,187 acres of land here in question were included in the land valued by petitioner in computing its 1916 capital stock tax return at an average value of \$3.00 an acre. It was the opinion of William S. Bliss in 1917 that this was the average value of the corporation's land in that year, when he [32] signed the 1916 capital stock tax return.

On January 29, 1918, at a meeting of a majority of the trustees of the petitioner, there was adopted the following resolution, which was approved by W. S. Bliss, as President:

Resolved: The Carson & Tahoe Lumber & Fluming Co., represented by its duly qualified and acting officers, desiring to comply with the United States Income Tax Law, in order to arrive at the value of the Company's property as of March 1st, 1913, does hereby fix as the the actual value of its real estate holdings

located in Washoe, Ormsby and Douglas Counties, Nevada, and El Dorado and Placer Counties, California, as being of the value of \$260,000, as of date of March 1st, 1913.

In 1913 the petitioner had about 44,000 acres in the tracts above referred to.

During the year 1913 the petitioner owned approximately 17,970 acres of land in Douglas County, Nevada, including the 11,187 acres here in question. All the 17,970 acres were assessed for State, School and County taxes levied in that year without any segregation of land into classes on the basis of a value of approximately \$1.44 an acre. On January 1, 1923, when Wm. D. Park, assessor at the time of the hearing, came into office, all this land was assessed, still without any segregation into classes, at \$1.25 an acre. The first segregation was made in that year, when mountain land was classified at \$1.25 or \$2.00 and grazing land at \$8.00, \$5.00 and \$3.00, depending upon its quality. No segregation of lake front property in Douglas County was made until 1926, 1927 or 1928, when such land along the lake became more valuable and was selling at good prices. Park was assisted in his classifications of land by Charles Fulstone, Land Commissioner of the Nevada Tax Commission, the same person who purchased several parcels of Lake Tahoe land from the petitioner, including the parcel called "Skyland". [33]

For the years 1920 and 1921 the petitioner filed with the assessor of Douglas County, written declara-

tions as to the value of its real property in that County, declaring it without classification at \$1.25 an acre. In each instance the assessor raised the valuation to \$2.00 an acre.

Frank Murphy was vice-president of the petitioner company from 1926 to 1939. From 1928 on, after W. S. Bliss and certain members of his family withdrew from the corporation, there remained outstanding only 358 shares of petitioner's stock. Murphy owned five of these shares and during 1935 and 1936 he had proxies to 219.3 and 263.3 more shares, respectively.

During 1935, Frank Murphy offered to the United States Forestry Service, all the backlands owned by the company, in Douglas County, Nevada, including the backlands of the acreage here in question, for \$3.00 an acre, and all the company's shore land in that County, exclusive of Zephyr Cove, for \$10.00 an acre. At the same time he offered to the Forestry Service 2,240 acres of backlands owned by the company, in California, south of the Lake, for \$3.00 an acre. After having all these lands checked by its appraisers, the Forestry Service concluded that the California lands offered were more valuable than the backlands in Douglas County, Nevada, and in 1938 it bought the California lands for \$3.00 an acre.

The fair market value of the 11,187 acres of land here in question, as of March 1, 1913, exclusive of improvements, was \$75,000. [34]

OPINION

Kern: There is a voluminous record in this proceeding and we have not deemed it necessary or feasible to embody in our findings each evidentiary fact which it contains. For example there is evidence concerning the sales of property in the State of California located on the south, west and north-west sides of Lake Tahoe and occurring over a period of some 35 years. We have contented ourselves with setting out in our findings only those sales taking place between 1903 and 1923 and covering property located on the east or Nevada side of the Lake where petitioner's property was located. Because of the differences in conditions which we have outlined in our findings, we have felt that sales of property on other sides of the Lake are of little help in ascertaining the fair market value as of March 1, 1913, of petitioner's land. Neither do we believe that sales made over ten years before or ten years after the basic date are of material assistance.

However, we have carefully considered all of the facts disclosed by record, together with the opinion testimony offered by both parties. Having thus considered all of the evidence presented, in the light of the cases cited by both parties and having given due consideration to all of the elements of value and principles of valuation referred to by such authorities, we have reached the conclusion embodied in our ultimate finding that the March 1, 1913 fair market value of petitioner's land involved herein, exclusive of improvements was \$75,000.

In addition to the authorities cited by the parties we call attention to two recent cases on the general subject of valuation, Commissioner v. Marshall, [35] ---- Fed. (2) ---- (CCA-2, Feb. 3, 1942); Helvering v. Safe Deposit and Trust Co. of Baltimore, Trustee, ---- U. S. ---- (April 13, 1942).

Decision will be entered under Rule 50.

Entered Jun 23 1942 [36]

United States Board of Tax Appeals
Washington

Docket No. 103735

CARSON AND TAHOE LUMBER AND FLUM-
ING CO.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the memorandum findings of fact and opinion of the Board entered June 23, 1942, the respondent herein on July 29, 1942 filed a recomputation, and on August 31, 1942 the petitioner filed an agreement to such recomputation. Now, therefore, it is

Ordered and Decided: That there is a deficiency in income tax for the calendar year 1938 in the amount of \$15,488.61.

[Seal] (Signed) JOHN W. KERN

Member

Enter:

Entered Sep 1 1942 [37]

United States Circuit Court of Appeals

For the Ninth Circuit

Tax Court of the United States

Docket No. 103735

CARSON AND TAHOE LUMBER AND FLUM-
ING COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW BY THE UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

To the Honorable Judges of the United States Cir-
cuit Court of Appeals for the Ninth Circuit:

Comes now Carson and Tahoe Lumber and Flum-
ing Company, by its attorneys, George H. Koster
and Llewellyn A. Luce, and respectfully shows:

Carson and Tahoe Lumber and Fluming Company
respectfully petitions the United States Circuit

Court of Appeals for the Ninth Circuit to review the decision of The Tax Court of the United States (formerly known as the United States Board of Tax Appeals) entered on September 1, 1942, ordering and deciding that there was a deficiency in petitioner's Federal income tax for the calendar year 1938 in the amount of \$15,488.61.

I.

JURISDICTION

Petitioner is a corporation duly organized and existing under the laws of the State of Nevada and maintains its principal [38] office in Carson City, Nevada. Petitioner's Federal income tax return for the calendar year 1938 was filed with the Collector of Internal Revenue for the District of Nevada, whose office is located in Reno, Nevada and within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

The case was tried and decided by the United States Board of Tax Appeals. Under Section 504 of the Revenue Act of 1942, approved October 21, 1942, the name of the Board of Tax Appeals was changed to "The Tax Court of the United States" effective as of October 22, 1942. Accordingly the Board of Tax Appeals will be hereinafter referred to as "The Tax Court of the United States."

The jurisdiction of this Court to review the decision of The Tax Court of the United States aforesaid is founded on Section 1141, Internal Revenue Code, Title 26 United States Code, Section 1141,

U.S.C.A., as amended by Section 504 of the Revenue Act of 1942.

The Commissioner of Internal Revenue of the United States hereinafter referred to as "respondent" determined a deficiency in petitioner's income tax for the calendar year 1938 in the amount of \$4,844.10 and on April 11, 1940, in accordance with the provisions of Section 272 of the Internal Revenue Code sent to petitioner by registered mail a notice of said deficiency. Thereafter and within ninety days from April 11, 1940, petitioner duly filed its appeal to the Tax Court of the [39] United States from the aforesaid determination of a deficiency in tax and alleged therein that there was no deficiency due from petitioner for the calendar year 1938 and that petitioner was entitled to a refund in tax of \$1,254.75 for said year. Thereafter the respondent duly filed his answer to petitioner's appeal and on March 13, 1941 filed an amended answer affirmatively alleging that the deficiency of \$4,844.10 as determined in the aforesaid notice of deficiency should be increased to \$17,963.61. The petitioner thereafter duly filed its reply to the said amended answer, denying that it owed any deficiency whatsoever and reaffirming the allegations set forth in its original appeal.

Thereafter on June 25, 1941 the case came on for hearing in San Francisco, California. On June 23, 1942 The Tax Court of the United States (then known as the Board of Tax Appeals) entered a Memorandum Findings of Fact and Opinion and

on September 1, 1942 The Tax Court of the United States (then known as the Board of Tax Appeals) entered its decision ordering and deciding that there was a deficiency of \$15,488.61 in petitioner's Federal income tax for the calendar year 1938.

II.

NATURE OF CONTROVERSY

The controversy herein concerns the petitioner's correct income tax liability for the calendar year 1938.

During the year 1938, petitioner sold to one George Whittell 11,187 acres of land on or near the shores of Lake Tahoe [40] in Douglas County, Nevada, with improvements thereon, for a total sum of \$300,433.27.

The issue involved is the amount of capital gain derived from the sale. This in turn depends upon the March 1, 1913 value of the 11,187 acres sold because this acreage was owned and held by the petitioner on March 1, 1913 and both parties agree that the March 1, 1913 value of the 11,187 acres is as a matter of law the proper cost basis for computing the gain on the sale in 1938. The gain is determined by subtracting from the selling price of the acreage in 1938 the fair market value thereof as of March 1, 1913. The parties further agree that the improvements on the land had a value or cost basis of \$30,428.25 on March 1, 1913.

Accordingly the question for decision by The Tax Court of the United States was the fair market

value of the 11,187 acres of land on March 1, 1913.

In its income tax return for 1938 the petitioner reported a fair market value on March 1, 1913 for the acreage of \$155,014 and a capital gain from the sale of \$114,991.02. The respondent determined in his notice of deficiency that the fair market value of the lands on March 1, 1913 was \$139,512.15, increased the capital gain on the sale by \$15,501.85 and proposed an additional tax against the petitioner of \$4,844.10.

On March 13, 1941 the respondent filed an amended answer alleging that the acreage had a fair market value as of March 1, [41] 1913 of \$60,000 instead of \$139,512 as he had previously determined in the deficiency notice and claimed that the deficiency in tax against the petitioner should on this basis be increased to \$17,963.61. Thus there were at least three determinations by the parties of the March 1, 1913 value of the acreage sold, as follows:

1. A value of \$155,014 shown by petitioner in its 1938 return.
2. A value of \$139,512.15 determined by respondent in the notice of deficiency dated April 11, 1940 from which petitioner appealed to the Tax Court.
3. A value of \$60,000 claimed by respondent in the amended answer filed March 13, 1941.

In the Memorandum Findings of Fact and Opinion entered by the Tax Court of the United States on June 23, 1942, it found a fair market value for the 11,187 acres of \$75,000 as of March 1, 1913. In its decision of September 1, 1942 the Court determined a deficiency in income tax against the peti-

tioner for 1938 of \$15,488.61 in lieu of the deficiency of \$4,844.10 originally determined by respondent. This increase in the deficiency was entirely due to the finding by the Court that the acreage sold had a fair market value as of March 1, 1913 of \$75,000 instead of \$155,014, as reported by petitioner on its 1938 return and in lieu of \$139,512.15 as determined by respondent in the notice of deficiency. [42]

III.

ASSIGNMENTS OF ERROR

In making and rendering its decision, as aforesaid, The Tax Court of the United States committed the following errors upon which your petitioner relies as a basis for this proceeding:

The Tax Court of the United States erred:

1. In determining a deficiency in petitioner's income tax for the calendar year 1938 in the amount of \$15,488.61.
2. In failing to determine that there was no deficiency in income due from petitioner for the year 1938 and that the petitioner had overpaid its Federal income tax for 1938 by the sum of at least \$1,254.75.
3. In finding that the fair market value as of March 1, 1913 of the 11,187 acres of land sold by petitioner in 1938 was \$75,000.
4. In failing to find that the fair market value as of March 1, 1913 of the 11,187 acres of land sold by petitioner in 1938 was not less than \$155,014 as reported by petitioner in his income tax return for 1938.

5. By finding that the acreage aforesaid had a fair market value of \$75,000 as of March 1, 1913 without setting forth any reasons for determining such a value of \$75,000 or showing by any computation, data or detail how such a figure was reached or determined. The said valuation of \$75,000 as found by the [43] Tax Court was not in accord with the determination of respondent in his notice of deficiency, nor with the figure claimed by respondent in his amended answer, nor with the March 1, 1913 value as shown by petitioner in its 1938 return and claimed before the Tax Court.

6. The March 1, 1913 value of \$75,000 as found by the Tax Court was not supported by any evidence and was contrary to the evidence adduced by the petitioner at the trial of the case.

7. In any event, the Tax Court erred by finding a lower value as of March 1, 1913 for the said acreage than the value of \$139,512.15 determined by respondent in his notice of deficiency dated April 11, 1940. There was no evidence adduced at the trial which would substantiate a fair market value as of March 1, 1913 of less than \$139,512.15 for the said acreage as found by the respondent in the notice of deficiency upon which his *prima facie* case was based.

8. The Tax Court of the United States erred in that there is neither in the findings of fact nor the memorandum opinion of the Court, any findings to sustain the Court's conclusion that the said acreage had a fair market value of \$75,000 as of March 1, 1913.

9. The Tax Court erred by failing to make a complete and sufficient findings of fact showing how the figure of \$75,000 was determined to be the fair market value as of March 1, 1913 of the acreage sold in 1938. [44]

10. The Tax Court erred by disregarding the un rebutted evidence of petitioner and reaching an independent conclusion of its own that the acreage in question had a fair market value of \$75,000 on March 1, 1913.

11. The Tax Court erred in that the notice of deficiency dated April 11, 1940 established a prima facie case for respondent that the acreage involved had a fair market value on March 1, 1913 of \$139,512.15 and the evidence adduced by respondent failed to rebut the presumption of value established by the deficiency notice or lend any support to respondent's amended answer claiming a March 1, 1913 value of \$60,000. In any event the Tax Court erred by finding a March 1, 1913 value for said acreage of less than the figure of \$139,512.15 determined by respondent in the notice of deficiency.

12. The Tax Court erred in not redetermining the deficiencies in favor of petitioner and against the respondent.

Wherefore, the taxpayer petitions that the decision of The Tax Court of the United States be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit and that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk

of said Court for filing, and that appropriate action be taken to the end that the errors complained of be reviewed and corrected [45] by said Court.

Respectfully submitted,

GEORGE H. KOSTER

300 Montgomery Street,
San Francisco, California.

LLEWELLYN A. LUCE

937 Munsey Building,
Washington, D. C.
Counsel for Petitioner.

District of Columbia—ss.

Llewellyn A. Luce, being first duly sworn, says that he is the attorney for the petitioner on review and as such is duly authorized to verify the petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision in the above entitled cause; that he has read the said petition and is familiar with the statements contained therein and that the facts therein stated are true except such facts as may be stated upon information and belief and these facts he believes to be true.

LLEWELLYN A. LUCE

Subscribed and sworn to before me this 27th day of November, 1942.

[Seal]

ELSIE P. DAMERON

Notary Public in and for the
District of Columbia.

My Commission Expires Oct. 15, 1943.

[Endorsed]: Filed Nov. 27, 1942. [46]

The Tax Court of the United States

Docket No. 103735

CARSON AND TAHOE LUMBER AND FLUM-
ING COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

NOTICE OF FILING PETITION FOR REVIEW

To Hon. J. P. Wenchel, Attorney for Respondent,
Chief Counsel, Bureau of Internal Revenue,
Washington, D. C.

You are hereby notified that on the 27th day of November, 1942, a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of The Tax Court of the United States (formerly United States Board of Tax Appeals) heretofore rendered in the above entitled cause, was filed with the Clerk of the Court. A copy of the petition as filed is attached hereto and served upon you.

LLEWELLYN A. LUCE

937 Munsey Building,

Washington, D. C.

Of Counsel for Petitioner.

Service of a copy of the foregoing notice, together with a copy of the petition for review, is hereby acknowledged this 27th day of November, 1942.

J. P. WENCHEL,

Chief Counsel, Bureau of Internal Revenue.

[Endorsed]: Filed Nov. 27, 1942. [47]

Before the United States Board of Tax Appeals

[Title of Cause.]

Post Office Building, San Francisco, California.

June 25, 1941. 10:00 o'clock A.M.

Before: John W. Kern.

Met pursuant to notice.

Appearances:

A. W. Helvern,

485 California Street, San Francisco, California, appearing for the Carson and Tahoe Lumber and Fluming Company, the Petitioner.

Arthur L. Murray,

appearing for the Commissioner of Internal Revenue, the Respondent. [49]

PROCEEDINGS

The Member: Docket No. 103735, Carson and Tahoe Lumber and Fluming Company.

Are the parties ready?

Mr. Murray: Ready.

Mr. Helvern: Ready for Petitioner.

The Member: Will counsel please state their appearances for the record?

Mr. Helvern: A. W. Helvern for the Petitioner.

Mr. Murray: Arthur L. Murray for Respondent.

[52]

Mr. Helvern: Mr. Bliss, will you take the stand?

MR. WILLIAM S. BLISS

a witness called on behalf of Petitioner, being first duly sworn, testified as follows:

The Clerk: State your full name, please.

The Witness: William S. Bliss, B-l-i-s-s.

Direct Examination [56]

Q. (By Mr. Helvern) Mr. Bliss, will you state your full name? A. William S. Bliss.

Q. And where were you born?

A. Gold Hill, Nevada.

Q. And on what date? What year?

A. August 25, 1865.

Q. Were you educated in Nevada? A. Yes.

Q. Where?

A. The schools, and then I went East to Massachusetts Institute of Technology.

Q. Massachusetts Institute of Technology, yes. What is your profession, Mr. Bliss?

A. Engineering; Civil Engineering; Mining Engineer.

(Testimony of William S. Bliss.)

Q. And anything else? Have you done anything else besides Civil Engineering?

A. Well, mining.

Q. Mining. And you are a real estate operator, are you not?

A. Oh, yes.

Q. Do you have a license to practice?

A. Yes.

Q. And you have had that for many, many years, I believe?

A. Yes.

Q. Mr. Bliss, what is your connection or what was your con- [57] nection with the Carson and Tahoe Lumber and Fluming Company?

A. I was first manager and vice-president.

Q. When did you become the manager of that company?

A. In 1907 when my father died.

Q. Your father died in 1907 and you became the manager. Your father had been the president and one of the principal stockholders?

A. The manager. He was the manager.

Q. And the manager. You succeeded your father?

A. Yes.

Q. In 1907?

A. Yes.

Q. You also became president of the company some time later, did you not?

A. When Mr. Yerington died.

Q. About what date was it when Mr. Yerington died?

A. I don't know exactly. I don't remember now. It was 1911, wasn't it?

Q. I think it was 1910.

A. Or '12.

(Testimony of William S. Bliss.)

Q. 1910. Does that seem the right date? Mr. Yerington had been the president and you succeeded him? A. Yes.

Q. Was Mr. Yerington a heavy stockholder in the company? [58] A. Yes.

Q. And what happened to his shares of stock after his death? A. It went into his estate.

Q. And did he leave a widow? A. Yes.

Q. And children? A. And children.

Q. When did you sever your connection with the Carson and Tahoe Lumber and Fluming Company, this Petitioner? A. I think it was '28.

Q. February, '28? A. Yes.

Q. And what have you done since 1928?

A. Well,— (Pause).

Q. Your principal occupation since 1928 when you severed your connection?

A. Well, running that land that we traded for.

Q. You traded certain stock, I believe?

A. Yes.

Q. You and certain other stockholders in your immediate family? A. Yes.

Q. Traded certain stock for certain lands?

A. That's it.

Q. And these lands that were received by you and your bro- [59] thers and sister were part of the lands that you had appraised previously for Carson and Tahoe, I believe? A. Yes, sir.

Q. Mr. Bliss, in your opinion were you familiar with the lands in the vicinity of Lake Tahoe, say, in the year 1910, 1912 and since that date?

(Testimony of William S. Bliss.)

A. Yes, sir.

Q. In what manner did you become familiar with those lands?

A. Well, I was in the logging business up there and did all the engineering, the surveying for the company.

Q. Approximately how much land did the company own in the vicinity of Lake Tahoe?

A. 44,000 acres.

Q. Sir? A. 44,000 acres.

Q. 44,000 acres. That was a large body of land, was it not, compared to the area of Lake Tahoe?

A. Yes. And there was 75,000 feet of shore.

Q. 75,000 feet of shore? A. Yes.

Q. And 44,000 acres of land? A. Yes.

Q. You stated that you were a Civil Engineer. Did you ever do any surveying or familiarize yourself with the nature of those lands by surveying? What were they? Roads? [60]

A. I ran railroads.

Q. Yes.

A. And logging roads and surveyed the land.

Q. You built the Truckee & Tahoe Railroad, did you not? A. Yes.

Q. And what other railroads did you build there as Civil Engineer?

A. Bijou—I don't know the name of it. It is a logging road about 15 miles.

Q. Mr. Bliss, you succeeded your father as the president of this company and you were actively the general manager from 1910 on? A. 1907.

(Testimony of William S. Bliss.)

Q. 1907. Pardon me.

The Member: On what part of the lake is that land located?

The Witness: All around the lake; North, South.

Mr. Helvern: I will present exhibits later, showing the exact location of the land, your Honor.

Q. (By Mr. Helvern) Mr. Bliss, I hand you a paper known as Exhibit No. 1 and that is a meeting of stockholders at Carson City, Nevada, September 18, 1907.

A. That was just before my father died.

Q. Just before your father died. You have looked at this and you are familiar with its contents, are you not? [61]

A. I don't know whether I am or not.

Q. Mr. Bliss, in this meeting of stockholders it was decided to reduce the capitalization of the company from 98,800 shares to 520 shares?

A. Uh-huh (Affirmative).

Q. And it was also decided to reduce the capital stock value from 2,080,000 to 260,000 shares.

Correction: That was \$2,080,000 was the original value of the stock, reduced to \$260,000. That \$260,000 Mr. Bliss, is indicated here (Indicating) as being to cover 520 shares with a value of \$500 each.

Is that your recollection? A. Yes.

Q. The company was then capitalized at \$260,000 effective from September 18, 1907, according to this? A. Yes.

Mr. Helvern: I present this.

The Member: You offer that as an exhibit?

(Testimony of William S. Bliss.)

Mr. Helvern: I offer this as Petitioner's Exhibit No. 1.

Mr. Murray: No objection.

The Member: Accepted in evidence.

The Clerk: One.

(The copy of minutes of meeting of stockholders, at Carson City, Nevada, September 18, 1907, so offered and received in evidence was marked Petitioner's Exhibit No. 1 and made a part of this record.) [62]

Mr. Helvern: This is a list of the Petitioner's Exhibits.

Q. (By Mr. Helvern) Mr. Bliss, I hand you two Exhibits, Exhibits Nos. 2 and 3. These Exhibits are a meeting of the Trustees of the Carson and Tahoe Lumber and Fluming Company dated September 12, 1910. This meeting of the Trustees authorized a sale of 239.51 acres of land to one F. J. Pomin for \$6,000. You recall that transaction, do you? A. Yes.

Q. I present you with Exhibit No. 3, a meeting of the Trustees of the Company dated November 12, 1910, authorizing the sale of land to one V. S. McClatchy for a sale price of \$1,500. The acreage is stated as being seven acres. A. Seven.

Mr. Helvern: Seven acres of land.

I submit these as Petitioners Exhibits Nos. 2 and 3.

Mr. Murray: No objection.

The Member: Accepted in evidence.

(Testimony of William S. Bliss.)

(Copies of minutes of meeting of stockholders so offered and received in evidence, were marked Petitioner's Exhibits Nos. 2 and 3.) [63]

Q. (By Mr. Helvern) Mr. Bliss, I understand that these lands owned by the Petitioner were, some of them, timberlands. Is that so? They were timberlands, were they not?

A. Yes, years before.

Q. They had timber on them. About when did they complete logging off all the timber on those lands?

A. Well, they shut down on account of the mines giving out and electric pumps coming in.

Q. No more sale for timber?

A. And no more sale for timber, and they shut down in 1898.

Q. 1898. What assets did the company own from 1898 on? Did they own any other assets besides the land? A. No other.

Q. Had it been the company's policy to declare dividends out of their incomes as they went along?

A. Yes.

Q. From whatever profits might be made by the sale of lumber and other profits? A. Yes.

Q. After they quit logging and selling lumber in 1898 what source of income did the company have? A. They had no source. [65]

Q. No source. They did have a source of income as they sold some of their lands?

A. Yes. They sold some of their equipment.

(Testimony of William S. Bliss.)

Q. Oh, they sold some of their old railroad equipment? A. Yes.

Q. That they used to log with? A. Yes.

Q. And they sold that and they also made these two sales that I have just questioned you about in 1910, one to Pomin, one to McClatchy?

A. Yes.

The Member: What kind of lumber was it?

The Witness: Mostly timbers for the Comstock mines.

The Member: What kind of trees?

The Witness: Oh, yellow pine.

The Member: Yellow pine?

The Witness: And fir. And the limbs were used for wood.

The Member: Is there any redwood around there?

The Witness: No. There is cedar, though.

The Member: Cedar.

Q. (By Mr. Helvern) Mr. Bliss, I hand you a paper called "Exhibit 4". This is Petitioner's Exhibit 4 and it is a notice signed by you, a copy of a notice signed by you, to Mr. Yerington, the secretary of the company, and dated March [66] 29, 1912. This notice advises the secretary, which you evidently signed as president, that there would be a meeting of the company at 10:00 A. M. on April 11, 1912. I will read the purpose of this: to consider the advisability of selling all of the property of said corporation, of entering into contracts for

(Testimony of William S. Bliss.)

the sale thereof, of giving options thereon, and of authorizing the execution of conveyances, et cetera; the advisability of amending certain sections of the By-Laws of the corporation, and such other business as may come before the meeting.

I hand you another paper called "Exhibit 5," which is a meeting of the stockholders of the company, held on the 11th day of April, 1912 at 10:00 o'clock, the meeting which you asked the secretary to call. At this meeting a majority of the stockholders are represented. A. What date?

Q. Sir? A. What date?

Q. This meeting was held April 11, 1912.

A. Oh, yes.

Q. Briefly, in this meeting the stockholders approved the entering into an agreement with you as a manager of the company and the person qualified to sell all the company's land within a period of five years from that date.

I hand you Exhibit No. 6, a special meeting of the [67] Board of Trustees of the company, held at 10:30 A. M., April 11, 1912, at which the company was authorized to enter into an agreement with you to sell all the lands of the company at a price fixed in a schedule submitted, which is known as Exhibit A in the minutes, which we will submit as another Exhibit; and you were to sell these lands and to receive a ten per cent commission upon such sales.

I hand you Exhibit No. 7. Exhibit 7 is an adjourned meeting of the Board of Trustees of the

(Testimony of William S. Bliss.)

Carson and Tahoe Lumber and Fluming Company held at one o'clock on April 11, 1912, the same day as the previous meeting in which the company is authorized to enter into an agreement with one J. B. Brewster, L. B. Edwards and C. M. Wooster, as parties of the second part, an agreement whereby these parties have an option to purchase all of the lands of the company at the prices stated in this amendment or in this Exhibit A in the minutes, that being an appraisal made by yourself.

Now, Mr. Bliss, I hand you a map known as Exhibit 8. Mr. Bliss, do you recall ever seeing this map before? A. I had it made.

Q. You had it made. You mean you had it drawn? A. Yes.

Q. You yourself are responsible for this map, are you? A. Yes.

Q. Mr. Bliss, this is the minute book of the corporation and [68] these are the minutes of the adjourned meeting of April 11, 1912, and this has a blueprint map which is designated as Exhibit B and forms a part of the minutes. Without going into detail at this time, is that map that I have just handed you a true copy of this map? A. Yes.

Q. You made both of them, did you not?

A. This is the original.

Q. Yes. You prepared this? A. Yes.

Q. Yourself? A. Yes.

Q. And you prepared that one? A. Yes.

Q. To the best of your knowledge and belief that is a true copy of this map?

(Testimony of William S. Bliss.)

A. Yes, sir. Wait a minute! This is the wrong map, I think, isn't it? You have got another one, haven't you?

Q. Yes. This is the right one. I will give you the other one later. A. Yes.

Q. Mr. Bliss, in our Exhibit 7, the minutes of the Trustees meeting, the adjourned meeting of April 11, 1912, there is contained a schedule called "Exhibit A"? A. Yes. [69]

Q. Do you recognize that exhibit?

A. Yes, sir.

Q. What is that exhibit? A. Well,—

Q. (Interposing) Part of the minutes?

A. (Continuing) —it gives the acreage and values and the shore and value of that.

Q. In other words, it gives the feet of shore, the acres and the total value?

A. The total value.

Q. In certain total values? A. Yes, sir.

Mr. Murray: I object to that, if that is meant to be a conclusion of the value. If he is identifying the document as to what he thought it was—

The Member: (Interposing) I think he was just identifying it.

Mr. Helvern: I will correct my statement. For the benefit of the Court and opposing counsel, I am merely stating what this Exhibit contains. It contains values indicated in dollars and these values are a part of the company's records. I will explain what those values mean in a moment or ask Mr. Bliss to explain them.

(Testimony of William S. Bliss.)

Mr. Murray: Well, if it is understood that they are just values that appear there without proving the value, [70] that is all right.

Mr. Helvern: That is understood.

Q. (By Mr. Helvern) Mr. Bliss, there are certain values in this Exhibit? A. Yes.

Q. The total of those seem to be \$778,500?

A. Yes.

Q. The total acreage is shown as 44,403 acres?

A. Yes.

Q. And the total feet of shore shown in this Exhibit A is 75,880? A. That's right.

Q. This schedule is broken down into 22 items, Nos. 1 to 22. Those, I believe, are block numbers, are they? A. Yes.

Q. And what do the block numbers mean? A certain area of land within certain boundaries?

A. That's it.

Q. All land owned by the Carson and Tahoe?

A. That's right.

Q. Mr. Bliss, what do these values mean? In your opinion, what are these values in this Exhibit? How did the values get into this Exhibit?

A. Well, I went over the land and estimated the value.

Q. You estimated these values? [71]

A. Yes, sir.

Q. When did you make this estimate?

A. 1912—'18—yes, 1912.

Q. 1912. Was it about the time this agreement

(Testimony of William S. Bliss.)

was entered into between you and the company to sell the land? A. That was the time.

Q. And this was for the purpose of determining what the minimum amount was that the land could be sold for? A. That's right.

Q. Is that true?

A. That's right.

Q. Mr. Bliss, in your opinion, at that time was this a realizable value that could be realized in accordance with the terms of this agreement?

A. Yes.

Q. You thought you could get that?

A. Yes.

Q. The terms of that agreement were for a period of five years, Mr. Bliss? A. Yes.

Q. Did you think at the time and did you draw this up thinking that you could probably sell the land within five years at that price?

A. Edwards and Webster had been talking about it and they practically agreed to take it. [72]

Q. Excuse me, Mr. Bliss.

A. And that was——

Q. (Interposing) Mr. Bliss, you refer to "Webster and Edwards". Do you mean to refer to——

A. (Interposing) Brewster.

Q. (Continuing) ——Edwards and Brewster? Are Brewster and Edwards the persons named in this Exhibit 7 in the minutes as persons who entered into the agreement with the company?

A. Yes, at that time.

(Testimony of William S. Bliss.)

Q. They named three persons: Brewster, Edwards and Wooster? A. Yes.

Q. What business were Brewster, Edwards and Wooster in? A. Real Estate.

Q. And where were their headquarters? In Nevada?

A. Their main office was in the Mills Building.

Q. In the Mills Building in San Francisco?

A. Yes.

Q. Were they a large concern?

A. Well, I suppose they were.

Q. Well, anyhow they handled large tracts of land apparently? A. Yes.

Mr. Murray: I will object to all this leading. I am letting all this leading go in.

The Member: I also call your attention to the fact that those Exhibits are not in the record yet.

[73]

Mr. Helvern: Without objection from counsel, I believe, I would like to submit as the Petitioner's Exhibit No. 4, copy of a letter dated March 29th from W. S. Bliss authorizing the holding of a stockholders meeting of the company.

Mr. Murray: No objection.

Mr. Helvern: Petitioner's Exhibit 4.

The Member: Accepted in evidence.

(The copy of letter so offered and received in evidence was marked Petitioner's Exhibit No. 4 and made a part of this record.)

(Testimony of William S. Bliss.)

Mr. Helvern: As Exhibit 5 a copy of the minutes of a special meeting of the stockholders of the company dated April 11, 1912, authorizing and directing sale of all the lands of the corporation.

Mr. Murray: No objection.

The Member: Accepted in evidence.

(The copy of minutes of special stockholders meeting so offered and received in evidence was marked Petitioners Exhibit No. 5, and made a part of this record.)

PETITIONER'S EXHIBIT No. 5

Special Meeting of the Stockholders of the Carson and Tahoe Lumber and Fluming Company, held at the office of the Company, Carson City, Nevada, on the 11th day of April, 1912, at the hour of 10 o'clock A. M.

The meeting was called to order by the President, W. S. Bliss, who presided throughout the meeting.

The Secretary announced that the call for this meeting had been mailed, and that proof of the publication and service of notice of the time and place of said meeting had also been filed. Said call and proof of publication and service were thereupon produced and read, whereupon, on motion duly made and seconded and unanimously carried, the same were approved.

The following stockholders representing the number of shares of stock set opposite their respective

(Testimony of William S. Bliss.)

names, were present either in person or by proxy, and participated in said meeting, to-wit:

Name	Present		Absent
	In Person	By Proxy	
W. D. Tobey.....		26	
Elizabeth T. Bliss.....		170	
Ogden Mills		79	
Elisabeth Mills Reid.....		80	
W. S. Bliss.....	10		
Jno. F. Cannon.....	5		
E. B. Yerington.....	25	4/5	
Clara V. Yerington.....		30	4/5
Jennie Avery Yerington.....		30	4/5
J. A. Yerington.....		30	4/5
H. H. Yerington.....		30	4/5
H. H. Taylor.....			1
	<hr/>	<hr/>	<hr/>
	40	4/5	478
			1/5
			1

The President announced that a majority of the stock of the corporation was represented at the meeting and qualified to vote on all propositions coming before it.

On motion duly seconded and unanimously carried, the following resolution was adopted:

Whereas, this corporation owns certain tracts of land lying around Lake Tahoe and located in the State of California and Nevada, which this corporation desires to dispose of either as a whole or in subdivision; now, therefore, be it

Resolved: That this corporation sell, grant, transfer and dispose of all of the real property of this corporation situate, lying and being on the

(Testimony of William S. Bliss.)

shores of, and in the vicinity of Lake Tahoe, and located in the States of California and Nevada.

Resolved Further: That the Board of Trustees of this corporation be, and they are hereby directed, authorized and empowered to take all steps and proceedings of every character and description necessary, proper or advisable in connection with the sale and disposition of all of said real property, and that said Board of Trustees determine upon each and all of the terms and conditions upon which said property shall be sold, and that said Board of Trustees have full power and authority to employ agents and brokers or other persons in connection with, and to negotiate the sale and disposition of said real property, and that said Board be given and granted full power and authority in the premises.

[Endorsed]: U. S. B. T. A. Filed June 25, 1941.

Mr. Helvern: Exhibit 6, the minutes of a special meeting of the Board of Trustees of the company dated April 11, 1912 authorizing the entering into an agreement of the company with W. S. Bliss for the sale of the company's lands, for which Mr. Bliss is to receive a compensation of ten per cent.

[74]

Mr. Murray: No objection.

Mr. Helvern: Of the realized sale.

The Member: Accepted in evidence.

(Testimony of William S. Bliss.)

(The minutes of special meeting of Board of Trustees so offered and received in evidence were marked Petitioner's Exhibit No. 6 and made a part of this record.)

PETITIONER'S EXHIBIT No. 6

Special Meeting of the Board of Trustees of the Carson and Tahoe Lumber and Fluming Company, duly called and held on the 11th day of April, 1912, at the hour of 10:30 A. M. of said day, at the office of the company, in the City of Carson, County of Ormsby, State of Nevada.

On roll call the following Trustees were noted present:

W. S. Bliss

J. F. Cannon

E. B. Yerington

The President, W. S. Bliss, presided at the meeting.

On motion, duly made and seconded, J. F. Cannon was unanimously elected Vice-President, to fill the vacancy occasioned by the death of Mr. H. H. Taylor.

The President, W. S. Bliss, called the Vice-President, J. F. Cannon, to the chair, and retired from the meeting.

On motion of Trustee Yerington, seconded by Trustee Cannon, the following resolution was unanimously adopted, to-wit:

Whereas, at a special meeting of the stockholders of this corporation held on the 11th day of April,

(Testimony of William S. Bliss.)

1912, it was declared by resolution, duly adopted, that all of the real property of this corporation situate on the shores of, and in the vicinity of Lake Tahoe, should be sold and disposed of; and

Whereas, this Board of Trustees was by said resolution given full power and authority to act in the matter of the sale and disposition of said real property, and in all matters pertaining thereto; now, therefore, be it

Resolved: That the Vice-President and Secretary be, and they are hereby authorized and directed to execute in the name of, and on behalf of, under the seal of this corporation, an agreement with W. S. Bliss in the words and figures following, to-wit:

This Agreement, made and entered into this 11th day of April, 1912, by and between the Carson and Tahoe Lumber and Fluming Company, a corporation organized and existing under and by virtue of the laws of the State of Nevada, party of the first part, and W. S. Bliss, of the City and County of San Francisco, State of California, party of the second part,

WITNESSETH:

Whereas, the party of the first part owns certain tracts of land lying on the shores of, and about Lake Tahoe, and located in the States of California and Nevada, and because of the non-productive character of said lands it seems for the best interest of the party of the first part to place the same on the market for sale; and

(Testimony of William S. Bliss.)

Whereas, the party of the second part has already performed valuable services for the party of the first part in connection with said lands, and in preparing for the sale and disposition thereof, for which services he has practically received no compensation; and

Whereas, on account of such services and the intimate knowledge the party of the second part has of said property, it will be to the advantage of the party of the first part to secure the future services of the party of the second part in connection with the sale and disposition of said lands;

Now Therefore, the party of the first part hereby employs the party of the second part to perform services for it in connection with preparations for the sale of said real property, negotiating sales thereof, procuring purchasers ready, willing, and able to purchase the same, either as a whole or in subdivisions, attending to the details of effectuating and closing all sales that may be made, and generally to perform any and all services that may be to the advantage or benefit of the party of the first part in connection with or in any manner relating to the sale of said real property.

This employment shall continue for the period of five (5) years from and after the execution of this agreement, unless all of said lands should be sooner disposed of, or unless the party of the second part should abandon the work of selling or disposing of the same.

(Testimony of William S. Bliss.)

The party of the second part shall receive no compensation for his services to be rendered under this agreement, excepting commissions on the sale of said real property, or subdivisions thereof, which commissions shall be paid as follows:

In case the party of the second part shall succeed in selling said lands as a whole or any subdivision or subdivisions thereof, he shall receive as a commission upon such sale or sales ten (10) per cent of the selling price of the lands sold, such commission, however, to be estimated and paid only upon moneys actually received by the party of the first part upon sales so negotiated by the party of the second part, it being the intention of this agreement that commissions shall only be paid upon money received from contracts for or executed sales, provided, however, that in case during the term of this agreement or before any abandonment thereof by the party of the second part, sales of said property should be made by the party of the first part, or any part thereof, either through its own endeavors or through other parties, the party of the second part shall nevertheless be entitled to his commission upon such sales; and provided further that in case any money should for any reason be refunded by the party of the first part on any sale or contracts the party of the second part shall repay to said first party all commissions theretofore received by him on the amounts refunded.

Said real property shall be sold either as a whole or in sub-divisions set forth and described in the

(Testimony of William S. Bliss.)

schedule hereto annexed, marked "Exhibit A", and specially referred to and made a part of this agreement, and said lands shall be sold for the prices set forth in said schedule, said prices to be net to the party of the first part, excepting that the commission of the party of the second part is to be deducted therefrom. Such prices shall not be changed by the party of the first part without the written consent of the party of the second part, provided, however, that they may be changed at any time by the written consent of stockholders of the party of the first part owning and holding a majority of the shares of the capital stock thereof. In case of any change in such prices, the commissions of the party of the second part shall be estimated upon such changed price, whether increased or reduced.

The party of the second part hereby accepts said employment and agrees to use his best endeavors to sell said real property at the prices designated in said annexed schedule, and to exercise due vigilance in the protection of the interest of the party of the first part in the making and consummation of such sales.

The party of the second part shall not have authority to execute any conveyances of said real property, or any part thereof, or to execute contracts for the sale thereof. All conveyances and contracts shall be executed by the party of the first part through its duly authorized officers.

The party of the first part agrees to furnish for the use of the party of the second part, Abstracts of

(Testimony of William S. Bliss.)

Title of all of said lands, and the party of the second part may use such abstracts in any way he may see fit in connection with the sale and disposition of said lands.

The party of the first part does not warrant its title to any of said lands or any part thereof, and will pay no commissions on any sales that may be negotiated, but which are not consummated through any defect of title, excepting that the second party shall receive commissions on moneys collected as aforesaid, subject to the refunding provision aforesaid.

It Is Understood that the party of the second part contemplates entering into an agreement with the El Dorado Wood and Flume Company, a corporation created, organized and existing under and by virtue of the laws of the State of Nevada; and

It Is The Further Understanding of the parties hereto that any services rendered by the party of the second part to the said El Dorado Wood and Flume Company in connection with the said contemplated agreement shall not be construed in any way to be a breach of this agreement by the said party of the second part.

In the event that the said party of the second part has the opportunity to sell either land of the party of the first part or of the said El Dorado Wood and Flume Company to the same purchaser, then and in that event the said party of the second part shall have the sole right to decide as to which land shall be sold to such purchaser.

(Testimony of William S. Bliss.)

The schedule hereto annexed contains a description not only of the lands of the party of the first part, but also of lands of the El Dorado Wood and Flume Company, and the lands of both said corporations are inter-mingled in said schedule, and in the sub-divisions therein described.

In Witness Whereof, the said party of the first part has hereunto set its hand and seal by its President and Secretary thereunto duly authorized by resolution of the Board of Directors thereof, and the party of the second part has hereunto set his hand the day and year first hereinabove written.

CARSON AND TAHOE LUM-
BER AND FLUMING COM-
PANY

By

President

By

Secretary

The President, Mr. W. S. Bliss, during the consideration of the resolution, having been absent from said meeting, and not having returned, on motion duly made and seconded a recess was taken until the hour of 1:00 o'clock P. M. of this day.

(signed) E. B. YERINGTON

Secretary

[Endorsed]: U.S.B.T.A. Filed June 26, 1941.

(Testimony of William S. Bliss.)

Mr. Helvern: Exhibit 7, the adjourned meeting of the Board of Trustees of the Company authorizing the entering into of an agreement with J. B. Brewster, L. B. Edwards and C. M. Wooster for the purchase by these persons of certain lands of the company, showing a total value as shown by Exhibit A of \$778,500.

Mr. Murray: If the record can show that that is an agreement of an option to purchase instead of a "purchase" as you stated, I am agreeable to it.

Mr. Helvern: That is an option to purchase.

The Member: I think the Exhibit will speak for itself.

Mr. Helvern: Yes, sir. Petitioner's Exhibit 7.

Mr. Murray: No objection.

The Member: Admitted in evidence.

(The minutes of meeting of Board of Trustees so offered and received in evidence was marked Petitioner's Exhibit No. 7 and made a part of this record.)

PETITIONER'S EXHIBIT No. 7

Adjourned meeting of the Board of Trustees of the Carson and Tahoe Lumber and Fluming Company, held at the office of the Company this 11th day of April 1912, at the hour of 1 o'clock P. M.

Present: Trustees W. S. Bliss

E. B. Yerington

J. F. Cannon

The President, W. S. Bliss, occupied the chair.

(Testimony of William S. Bliss.)

On Motion of Trustee Cannon, seconded by Trustee Yerington, the following resolution was unanimously adopted, to-wit:

Whereas, W. S. Bliss, pursuant to authority given him under the agreement of this corporation with him, executed on this day, and pursuant to the authority given by resolution adopted by this Board at its meeting heretofore held on this day, has presented for action by this Board, an option agreement between this corporation as party of the first part, and J. B. Brewster, L. B. Edwards and C. M. Wooster, as parties of the second part, relating to the sale of the real property of this corporation lying on the shores of and in the vicinity of Lake Tahoe; and

Whereas, it appears that it will be for the best interests of this corporation to enter into said option agreement; now, therefore, be it

Resolved: That the President and Secretary be, and they are hereby authorized and directed to make and execute for and on behalf of, and in the name of, and under the seal of this corporation, said option agreement, which is in the words and figures following, to-wit:

“This Agreement, made and entered into this 11th day of April, 1912, by and between the Carson and Tahoe Lumber and Fluming Company, a corporation organized and existing under and by virtue of the laws of the State of Nevada, the party of the first part, and J. B. Brewster of the County of Alameda, State of California, and L. B. Edwards

(Testimony of William S. Bliss.)

and C. M. Wooster, both of the City and County of San Francisco, State of California, the parties of the second part,

Witnesseth:

Whereas, the party of the first part owns certain tracts of land lying around Lake Tahoe and located in the States of California and Nevada, all of which real property is hereafter more particularly described; and

Whereas, said party desires to dispose of said lands either as a whole or in sub-divisions; and

Whereas, the parties of the second part desire an option to purchase said lands either as a whole or in sub-divisions as they may elect;

Now Therefore, the party of the first part gives and grants unto the parties of the second part, or to their nominee or nominees, an option to purchase the real property hereinafter described, either as a whole or in sub-divisions for the prices and upon the terms and conditions hereinafter stated.

This option shall continue and be in force for the period of five (5) years from and after the execution of this instrument.

There is attached hereto a schedule which is marked "Exhibit A" and made a part of this agreement. Said schedule sets forth and describes said real property by parcels or sub-divisions numbered 1 to 22, both numbers inclusive, which schedule sets forth the net price for which the party of the first part agrees to grant and transfer its lands under this option. Said schedule also sets forth and de-

(Testimony of William S. Bliss.)

scribes the parcels or sub-divisions which the parties of the second part shall have the right to purchase hereunder. It is understood, however, that all of the land described in said annexed schedule is not the property of the party of the first part. Some of the property described in said parcels or sub-divisions is held or owned by the El Dorado Wood and Flume Company, a corporation organized and existing under and by virtue of the laws of the State of Nevada.

EXHIBIT A

Number	Feet of Shore	Acres	Total Value
1	8250	559	\$27,500
2	3300	2210	58,500
3	3120	1343	14,500
4		3172	25,000
5		2265	23,500
6	1350	1985	16,500
7	4000	1272	23,000
8	4290	1586	32,500
9	2760	1381	28,500
10	9250	2609	68,500
11	4660	2898	38,500
12		4008	26,000
13	2200	6090	57,000
14	3300	2403	32,500
15	8600	242	28,500
16		880	6,500
17	1800	438	25,500
18		480	10,500
19	8600	2576	75,500
20	2000	3350	58,000
21	3100	1975	75,000
22	5300	681	27,000
	<hr/> 75880 <hr/>	<hr/> 44403 <hr/>	<hr/> \$778,500 <hr/>

(Testimony of William S. Bliss.)

The parties of the second part undertake to buy from the party of the first part during the first year after the execution of this option an amount that will yield ten (10) per cent net of the total selling price of the real property of the party of the first part, and said last named corporation, twenty (20) percent thereof during the second year, twenty (20) percent thereof during the third year, twenty (20) percent thereof during the fourth year, and the remainder or thirty (30) percent during the fifth year. Such percentages of the total selling price of said property must be actually paid during said respective years in order to make full compliance with this provision of this option; provided, however, that such payment may be made one half ($\frac{1}{2}$) in cash, and one half ($\frac{1}{2}$) in first mortgages on the property sold, said mortgages not to be for more than fifty (50) percent of the net prices specified herein. And provided further, that if the total amount paid to both the party of the first part and the El Dorado Wood and Flume Company during each of said years equals the percentages above named, such payment shall be deemed a full compliance with this provision of this option even if each of said corporations does not receive such percentages year by year.

The parties of the second part further agree to expend not less than Ten Thousand (10,000) Dollars in properly advertising, exploiting and selling said real property, such expenditure to be made during the first year after the execution of this

(Testimony of William S. Bliss.)

option, and said second parties shall furnish to the first party satisfactory evidence of such expenditure for such purpose. In the event that it becomes necessary to expend more than Ten Thousand (10,000) Dollars in advertising, exploiting and selling said property, the party of the first part will lend to the parties of the second part an amount not to exceed fifty (50) percent of the cash actually received by the party of the first part on sales theretofore made, such loan, however, not to exceed in any event the sum of Twenty-five Thousand (25,000) Dollars. Said loan will be evidenced by promissory notes to be satisfactorily secured by the parties of the second part. The hypothecation of all moneys due, owing or payable to the parties of the second part or either of them upon sales that may be made by them to third parties under this option, may be used as security for the repayment of such advances, provided, however, that no greater amount shall be advanced than will be amply secured by such hypothecation.

It is understood and agreed that this option is given in consideration of the aforesaid agreements and stipulations on the part of the parties of the second part, and that in the event of the failure of the parties of the second part or either of them to perform or carry out all of said agreements and stipulations, then this option shall lapse and become void, and of no force and effect, and all rights of the parties of the second part or either of them thereunder shall immediately cease.

(Testimony of William S. Bliss.)

The party of the first part agrees that it will execute deeds of conveyance of all of said real property owned by it or of all sub-divisions thereof owned by it, said deeds to be made either to the parties of the second part or their nominees in writing upon receiving the full purchase price of the property so sold and transferred as hereinabove provided. The party of the first part will also make, execute and deliver written contracts of sale of said real property or any sub-division or sub-divisions thereof, either to the parties of the second part or to their nominees in writing, retaining the title thereto in the present holder thereof until full payment is made therefor, such contracts to contain such terms, conditions and provisions as shall be satisfactory to the party of the first part.

It is understood and agreed that the party of the first part does not make any representation or warranty with respect to its title to any of said real property. If any of said property or any part thereof should be sold to the parties of the second part or to either of them or to their nominee or nominees, such purchaser or purchasers shall take the title to said property and to each and every part thereof as they find it, and in the event that it should develop that the title to any of said property is defective, the party of the first part shall have six (6) months time within which to cure said defect, and to make said title satisfactory to the purchaser or purchasers. If in any case said title should not be made satisfactory to the purchaser

(Testimony of William S. Bliss.)

or purchasers, they or either of them may either take said title in its defective condition, receiving a quit-claim deed therefor from the party of the first part, or may drop from the sale or sales, such part of said property as may be affected by said defect of title at such price as may be mutually satisfactory, or may rescind said sale; provided, that no sale shall be rescinded after deeds of conveyances are delivered.

The parties of the second part shall not be entitled to purchase any part or portion of, or less than the whole of any parcel or sub-division of said real property unless such part should be dropped therefrom by reason of defect of title as hereinabove provided, unless agreed to in writing by the party of the first part.

Annexed hereto and made a part of this option is a map or print showing a sufficient description of all of said property and the parcels or sub-divisions described in "Exhibit A" attached hereto; said map or print is marked "Exhibit B" and made a part of this option, and said schedule annexed hereto and marked "Exhibit A" shall be construed in connection with said "Exhibit B" for the purpose of identifying and obtaining correct and accurate descriptions of the property covered by this option.

In Witness Whereof, the parties hereto have hereunto set their hands and seals, said Carson and Tahoe Lumber and Fluming Company by its president and secretary thereunto duly authorized, the day and year first hereinabove written.

(Testimony of William S. Bliss.)

No further business appearing before the Board, the same adjourned.

(signed) W. S. BLISS

President

(signed) E. B. YERINGTON

Secretary

[Endorsed]: U.S.B.T.A. Filed June 25, 1941.

The Member: I take it that counsel for Respondent by making no objection has, in effect, stipulated that these [75] minutes are what they purport to be.

Mr. Murray: Exactly. And I have checked them.

The Member: Because I call counsel's attention to the fact that the witness has not identified a single exhibit. They have been adequately identified by counsel, but not by this witness. But if Respondent makes no objection, that is to be considered as a stipulation that the statements are what they purport to be and they will go in the record as such.

Mr. Murray: Yes. I agree to that.

Mr. Helvern: Subject to a later check as to the details on this map by Government counsel, I submit as Petitioner's Exhibit 8 a map of Lake Tahoe and the land in the vicinity of Lake Tahoe.

The Member: That Exhibit has been adequately identified by the witness. Do you object to the introduction in evidence of this Exhibit?

(Testimony of William S. Bliss.)

Mr. Murray: No. I don't object to that.

The Member: It will be admitted in evidence.

(The map so offered and received in evidence was marked Petitioner's Exhibit No. 8, and made a part of this record.)

Mr. Helvern: This is Exhibit 8, which is identified as being a map of the lands included in the appraisal of W. S. Bliss, with the various parcels identified by block numbers enclosed in black lines. [76]

The Member: All right. Proceed.

Q. (By Mr. Helvern) Mr. Bliss, I hand you a paper indicated as being Exhibit 9. Will you please identify that and tell us what that paper is?

A. Well, it is a letter from Wooster that I received on an extension of time.

Q. Yes. You have identified it as being a letter from Mr. Wooster. The date?

A. April 5, 1913 after his first option expired.

Q. Yes. This letter which you state is from Mr. Wooster is signed C. M. Wooster? A. Yes.

Mr. Helvern: I submit this as Petitioner's Exhibit 9, a letter from C. M. Wooster of C. M. Wooster Company.

The Member: No objection?

Mr. Helvern: Dated April 5.

The Member: No objection?

Mr. Murray: No objection.

The Member: Accepted in evidence.

(Testimony of William S. Bliss.)

(The letter so offered and received in evidence was marked Petitioner's Exhibit No. 9 and made a part of this record.)

Q. (By Mr. Helvern) Mr. Bliss, you stated in this letter that Mr. Wooster asked for an extension of time. Do you recall the length of time he wanted an extension for? [77]

A. Well, he wanted more than we gave him. We gave him a month.

Q. How much did he want?

A. Well, I think he wanted a year.

Q. Does the——

A. (Interposing) I don't know whether it says so or not.

Q. I will see if it says a year. I believe it does. Check to see if that is the extension. Would you mind reading the portion that asks for the extension? Mr. Bliss would you read this paragraph of the letter to indicate what his reasons were for asking for an extension?

A. "I regret that nothing materially has been accomplished under the option. Diligent effort has been made but last year was one of liquidation generally throughout this country. It was characterized by conservatism in all branches of business, causing a peculiar money stringency and rendering impossible the floating of a project such as this, one appealing more to the luxuries than the necessity.

"It was a Presidential year, whose results brought a change; whether for ultimate good or evil, the

(Testimony of William S. Bliss.)

change caused a general depression in financial affairs.

“We had a number of strong and influential men of affairs from Southern California over the ground and made every possible effort to bring about successful negotiations with this, but the atmosphere of the times was against this. [78]

“I have had negotiations with some people of ample means to take over the project, but about the time they were ready to proceed in the matter, the money trust investigation gave further excuses for conservative methods.

“I have been disappointed in my own efforts, yet I believe it would have been impossible for anyone to have accomplished the sale of the lands during the past year. I believe it best to proceed on the lines of selling individual tracts and if the company will renew the option, we will undertake the last named plan and certainly we can do more than strangers to the project, and I ask that you request a renewal of the option in our behalf and I will give it more earnest effort. Negotiations under way, in which I have faith, warrant this request.”

Q. Yes. He asked for a one-year renewal?

A. As I remember it, it was a year.

Q. Yes. A. We gave them a month.

Q. You gave him how much?

A. One month, I think.

Q. What happened after the month expired?

A. We canceled it.

(Testimony of William S. Bliss.)

Q. No further agreement with Mr. Wooster or his associate? A. No, no further agreement.

Q. Mr. Bliss, I hand you a paper marked as Exhibit 10. Tell [79] us what that paper indicates, briefly?

A. Do you want me to read it?

Q. No. Just what is that paper?

A. (No response)

Mr. Helvern: With the permission of counsel I would like to help the witness.

Q. (By Mr. Helvern) That paper is merely an extension of one month's time to Brewster?

A. It says here "Resolved: That the option heretofore given to C. M. Wooster & Co. be and the same is hereby extended for the period of thirty days, to expire on the 11th day of May next."

The Member: Is that a copy of the minutes of the Board of Directors?

Mr. Murray: Yes. I will so stipulate.

Mr. Helvern: Meeting of the Trustees.

The Member: All right. Do you offer it in evidence?

Mr. Helvern: I offer that in evidence as Petitioner's No. 10.

The Member: There is no objection?

Mr. Murray: No objection.

The Member: Accepted in evidence.

(The copy of option so offered and received in evidence was marked Petitioner's Exhibit No. 10 and made a part of this record.) [80]

(Testimony of William S. Bliss.)

PETITIONER'S EXHIBIT No. 10

Meeting of Trustees

April 7th, 1913

At a meeting of the Board of Trustees of the Carson & Tahoe Lumber & Fluming Company, held at the office of the company, in the City of Carson, Nevada, this day, Messrs. W. S. Bliss, Jno. F. Cannon and E. B. Yerington, constituting the Board were present.

Trustee W. S. Bliss in the Chair

Trustee E. B. Yerington acting as Secretary

Motion made and seconded that election of officers be proceeded with.

Mr. W. S. Bliss nominated as President

Mr. Jno. F. Cannon nominated as Vice President

Mr. E. B. Yerington nominaed as Secretary

Bank of California nominated as Depository

No further nominations having been made, the gentlemen were duly declared elected to the several offices to serve until their successors shall have been duly elected and qualified.

Messrs. C. M. Wooster & Co., holding option on lands of the company in the vicinity of Lake Tahoe, which option expires April 11th, addressed a communication to the company asking for an extension of time on the option.

On motion, duly seconded, it was

Resolved: That the option heretofore given to C. M. Wooster & Co., be and the same is hereby extended for the period of thirty (30) days, to expire

(Testimony of William S. Bliss.)

on the 11th day of May next.

No further business appearing, the meeting on motion adjourned.

(signed) E. B. YERINGTON

Secretary

(signed) W. S. BLISS

President

[Endorsed]: U.S.B.T.A. Filed June 25, 1941.

The Member: Mr. Helvern for the purpose of taking up another matter just for a few moments, I am going to declare a recess in this case. We will convene in just a moment.

(Here followed short interruption.)

The Member: All right, gentlemen. We will go back to the Bliss case.

Q. (By Mr. Helvern) Mr. Bliss, I hand you a map. I would like to have you describe that map. Just briefly, what is it?

A. Why, it gives the sales, it gives the dates, acreage feet of shore, and amount received for different pieces of land.

Q. Sales made by whom, Mr. Bliss?

A. By the company and by others.

Q. Are you sure there are any sales made by others on there? Identify that. I don't think so.

A. I don't think that there are any by others on here.

Mr. Murray: If your Honor please I won't ob-

(Testimony of William S. Bliss.)

ject to this map going in if I may have the privilege of checking it later, if Mr. Bliss is not clear what is on there.

Mr. Helvern: All right. For the saving of time, this is a map, as stated by the witness, showing sales made by the company of lands in the vicinity of Lake Tahoe, lands owned by Petitioner. [81]

The Member: Where does it show the sales that are made?

The Witness: This is another map.

The Member: Oh, is this another map?

Mr. Helvern: Yes. This map is the same blue-print outlined in black.

The Member: Oh, I see.

Mr. Helvern: And the description contains the sales made by the company.

The Member: I see. And you want to check this?

Mr. Murray: Yes, if your Honor please. I have a map myself that I want to ask the same thing, with your indulgence, and we will check both maps later, if it suits your Honor.

The Member: All right.

Mr. Helvern: These maps will be made available to other counsel. When the clerk returns I will put in all the Exhibits, with the consent of Government counsel.

The Member: All right. Fine!

The Witness: This just shows the land and the other map shows the sales.

The Member: Yes.

Q. (By Mr. Helvern) Mr. Bliss, you have stated

(Testimony of William S. Bliss.)

that you entered into an agreement with the company to sell all of its lands in the vicinity of Lake Tahoe? A. Yes. [82]

Q. Generally for the prices stated in this appraisal of yours? A. Yes, sir.

Q. That is true. And this was your own appraisal? A. Yes, sir.

Q. What experience did you have in appraising lands or determining the value of lands in the vicinity of Lake Tahoe, such lands as you did then appraise?

A. I went to Tahoe in '69 and went there every year afterwards. So I saw these lands and surveyed it and had a general idea of things; heard of some sales being made and just formed an idea from different things that those were the prices, the values.

Q. Yes. Thinking of Lake Tahoe, this land, constituting 44,000-odd acres and a large frontage on Lake Tahoe, constituted in your opinion what percentage of the total land in the near vicinity of Lake Tahoe and on the shore frontage of the whole lake? What percentage would you say was owned by your company? A. You mean Tahoe Basin?

Q. Yes. Would you say it was twenty per cent or fifty per cent?

A. Tahoe Basin had 519 square miles.

Q. I refer to land with frontage on Lake Tahoe.

A. There was about a hundred miles around the lake. [83]

Q. Anyhow, Mr. Bliss, this land constituted a

(Testimony of William S. Bliss.)

very large percentage of all the land with a frontage on lake Tahoe?

A. Yes, the largest holdings there.

Q. Is it true that on the Nevada side they held nearly all the lake frontage? A. Yes.

Mr. Helvern: Nearly all of it.

I submit that Petitioner's Exhibit, with the consent of Government counsel, Exhibits Nos.—I have a complete description of these exhibits which I am handing to the clerk and which we will identify later—Exhibits 11, 12, 13, 14, 15, 16, 17 and 18.

The Member: No objection?

Mr. Murray: No objection.

The Member: Accepted in evidence.

(The documents so offered and received in evidence were marked Petitioner's Exhibits Nos. 11 to 18 inclusive and made a part of this record.)

PETITIONER'S EXHIBIT No. 11

Special Meeting of the Board of Trustees of Carson and Tahoe Lumber and Fluming Company, September 24th, 1913.

Pursuant to notice duly given, a Special Meeting of the Board of Trustees of the Carson and Tahoe Lumber and Fluming Company was held at the office of the Company, Carson City, Nevada, on the 24th day of September, 1913, at the hour of 10:30 o'clock A. M., at which a quorum was present.

On motion, duly made and seconded, the following resolution was unanimously adopted, to-wit:

(Testimony of William S. Bliss.)

Whereas, W. S. Bliss, President of this Company, has presented for action by this Board, an option agreement between this Corporation, as party of the first part, and William Ferdinand Detert, as party of the second part, covering real property owned by this corporation, and it appearing that it will be for the best interests of this corporation to enter into said option agreement, now, therefore, be it

Resolved: That the President and Secretary be, and they are hereby authorized and directed to make and execute for and on behalf of, in the name of, and under the seal of this corporation, said option agreement, in the words and figures following, to-wit:

“This Indenture, made the 24th day of September 1913 by and between Carson and Tahoe Lumber and Fluming Company, a corporation organized and existing under and by virtue of the laws of the State of Nevada, the party of the first part, and William Ferdinand Detert, of the City of Jackson, County of Amador, State of California, the party of the second part,

Witnesseth:

For and in consideration of the sum of One Dollar to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and for other good and valuable consideration it hereunto moving, the party of the first part hereby gives and grants unto the party of the second part an exclusive option and right to purchase for the

(Testimony of William S. Bliss.)

period of ninety days from the date hereof, for the sum of Twenty-six thousand, one hundred, sixty dollars (\$26,160.00) in lawful money of the United States of America, the following described real property situate, lying and being in the County of Douglas, State of Nevada, more particularly described as follows, to-wit:

Lot Two (2) in Section Nine (9), containing Thirty-four and Twenty-one-hundredths (34.20) acres, South half of South half of Section Ten (10), containing One Hundred Sixty (160) acres, all of Section Thirteen (13), containing Six Hundred Forty (640) acres, North half, Southwest quarter, North half of Southeast quarter, Southwest quarter of Southeast quarter, of Section Fourteen (14), containing Six Hundred (600) acres, East half of Section Fifteen (15), containing Three Hundred and Twenty (320) acres, Lot One (1) of Section Twenty-one (21), containing Two and Thirty-one-one-hundredths (2.31) acres; Lots One (1) and Two (2) of Section Twenty-two (22), containing Sixty-one and Sixty-eight one-hundredths (61.68) acres, West half of Northeast quarter, Northeast quarter of Northwest quarter, Northwest quarter of Southeast quarter, of Section Twenty-three (23), containing One Hundred and Sixty (160) acres, North half of Northeast quarter, Northwest quarter, and Northwest $\frac{1}{4}$ of Southwest quarter of Section Twenty-four (24) containing Two Hundred and Eighty (280) acres, containing in all Two Thousand, Two Hundred Fifty-eight and Nineteen One-Hundredths

(Testimony of William S. Bliss.)

(2,258.19) acres more or less, all in Township Number Thirteen (13) North, Range Eighteen (18) East, Mount Diablo Base and Meridan;

It being understood that said option may be exercised by the party of the second part by paying to the credit of the party of the first part at any time within said Ninety days the above named sum of Twenty-six Thousand, One Hundred and Sixty Dollars (\$26,160.00) in lawful money of the United States at the Mercantile National Bank of San Francisco, 464 California Street, San Francisco, California.

There is excepted from the provisions of this Option however, the rights of Lewis I. Cowgill under the provisions of that certain agreement between the party of the first part herein and him, allowing and permitting him to erect upon the N. E. $\frac{1}{4}$ of Section 15, T. 13 N., R. 18 E., Mt. Diablo Base & Meridian, and maintain for the period of twenty-five years a dam, tank or reservoir for the purposes set forth in said agreement.

In Witness Whereof, the party of the first part has caused these presents to be subscribed by its President and Secretary, thereunto duly authorized by resolution adopted at a duly called meeting of its Board of Trustees at which a quorum was present and acting, as the act and deed of said corporation,

(Testimony of William S. Bliss.)

and its corporate seal to be affixed thereto, the day and year herein first above written.

CARSON AND TAHOE LUM-
BER AND FLUMING COM-
PANY

By

Its President,

And by.....

Its Secretary.”

On motion, duly made and seconded, the following resolution was unanimously adopted, to-wit:

Resolved: That the President and Secretary be, and they are hereby authorized and directed to execute in the name of, on behalf of, and under the seal of this Corporation, a Lease to William Ferdinand Detert, upon the terms and conditions in words and figures following, to-wit:

“This Agreement, made and entered into the 24th day of September, 1913, by and between the Carson and Tahoe Lumber and Fluming Company, a corporation organized and existing under and by virtue of the laws of the State of Nevada, lessor, and William Ferdinand Detert, of the City of Jackson, County of Amador, State of California, lessee.

Witnesseth: That said lessor hereby leases to said lessee a right of way and easement of the width of fifty feet over and across that portion of the following lands belonging to said lessor, to-wit: over and across sections thirteen, fourteen, fifteen, twenty-two, twenty-three and twenty-four, township 13

(Testimony of William S. Bliss.)

north, of range 18 east, Mount Diablo Base and Meridian, for logging purposes, whether by logging-trucks, chutes, or otherwise, together with a log landing, to be chosen by the lessee, five hundred feet in width along the shore where said section 22 abuts on the Easterly shore of Lake Tahoe, extending backward on Lots 1 and 2, or lot 1 or 2, of said section 22, as far eastward as may be actually necessary for the logging operations of said lessee, for the period of fifteen years from the date hereof, at the yearly rental of one dollar per year, payable only upon demand of said lessor, which said rental said lessee hereby promises to pay upon such demand.

And it is agreed that said lessee shall have no right to cut or deface any timber standing upon said portion of said log-landing lying back of said shore, but shall have the right to cut any timber necessary to clear said right of way or easement fifty feet wide; provided, however, that for any fir so cut said lessee shall pay stumpage at the rate of one dollar per thousand feet, and for any pine so cut said lessee shall pay stumpage at the rate of two and one-half dollars per thousand feet of merchantable lumber; and provided, further, that said lessee shall be entitled to only one such right of way or easement fifty feet wide, and shall not have the right after he shall have elected and cut out one such right of way to elect or cut out another.

It is further agreed that in case said lessee shall complete, or cease and abandon logging operations upon land owned by him, so that he shall finish or

(Testimony of William S. Bliss.)

cease and abandon using said right of way and easement before the expiration of this lease, as hereinbefore specified, then this lease shall cease and determine, and the right of possession of said right of way and easement hereby leased shall thereupon revert to said lessor, and a failure of said lessee to use said right of way and easement for logging purposes for two successive years shall be deemed to constitute an abandonment of the same within the meaning of this provision.

In Witness Whereof, said lessor, by resolution duly adopted at a meeting of its Board of Trustees at which a quorum was present and acting, has caused these presents to be subscribed by its President and Secretary, and its corporate seal to be attached thereto, in duplicate, and said lessee has hereunto set his hand and seal, the day and year herein first above written.

CARSON AND TAHOE LUMBER AND FLUMING COMPANY

By

Its President

and by

Its Secretary

Lessor

.....

Lessee"

On motion, duly made and seconded, the following resolution was unanimously adopted, to-wit:

Resolved: That the President and Secretary be,

(Testimony of William S. Bliss.)

and they are hereby authorized and directed to execute in the name of, on behalf of, and under the seal of this Corporation, and as its act and deed, a Deed to William Ferdinand Detert (unmarried) of the City of Jackson, County of Amador, State of California, in words and figures following, to-wit:

“This Indenture, made and entered into the 24th day of September, 1913, by and between Carson and Tahoe Lumber and Fluming Company, a corporation organized and existing under and by virtue of the laws of the State of Nevada, the party of the first part, and William Ferdinand Detert, (unmarried) of the City of Jackson, County of Amador, State of California, the party of the second part,

Witnesseth: That said party of the first part for and in consideration of the sum of Ten Dollars (\$10.00), lawful money of the United States of America, to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, the party of the first part hereby grants, bargains, sells and conveys forever, all that certain land situate, lying and being in the County of Douglas, State of Nevada, more particularly described as follows, to-wit:

All of Section Twenty-five (25) in Township Thirteen (13) North, Range Eighteen (18) East, Mount Diablo Base and Meridian, containing Six Hundred and Forty (640) acres, more or less;

Together With, All and Singular, the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion

(Testimony of William S. Bliss.)

and reversions, remainder and remainders, rents, issues and profits thereof;

To Have and to Hold, All and Singular, the said premises, together with the appurtenances, unto the party of the second part, his heirs and assigns forever.

In Witness Whereof, the party of the first part has caused these presents to be subscribed by its President and Secretary, thereunto duly authorized by resolution adopted at a duly called meeting of its Board of Trustees at which a quorum was present and acting, as the act and deed of said corporation, and its corporate seal to be affixed thereto, the day and year herein first above written.

CARSON AND TAHOE LUM-
BER AND FLUMING COM-
PANY,

By
Its President

And by.....
Its Secretary''

No further business appearing, upon motion, duly made and seconded, the meeting adjourned.

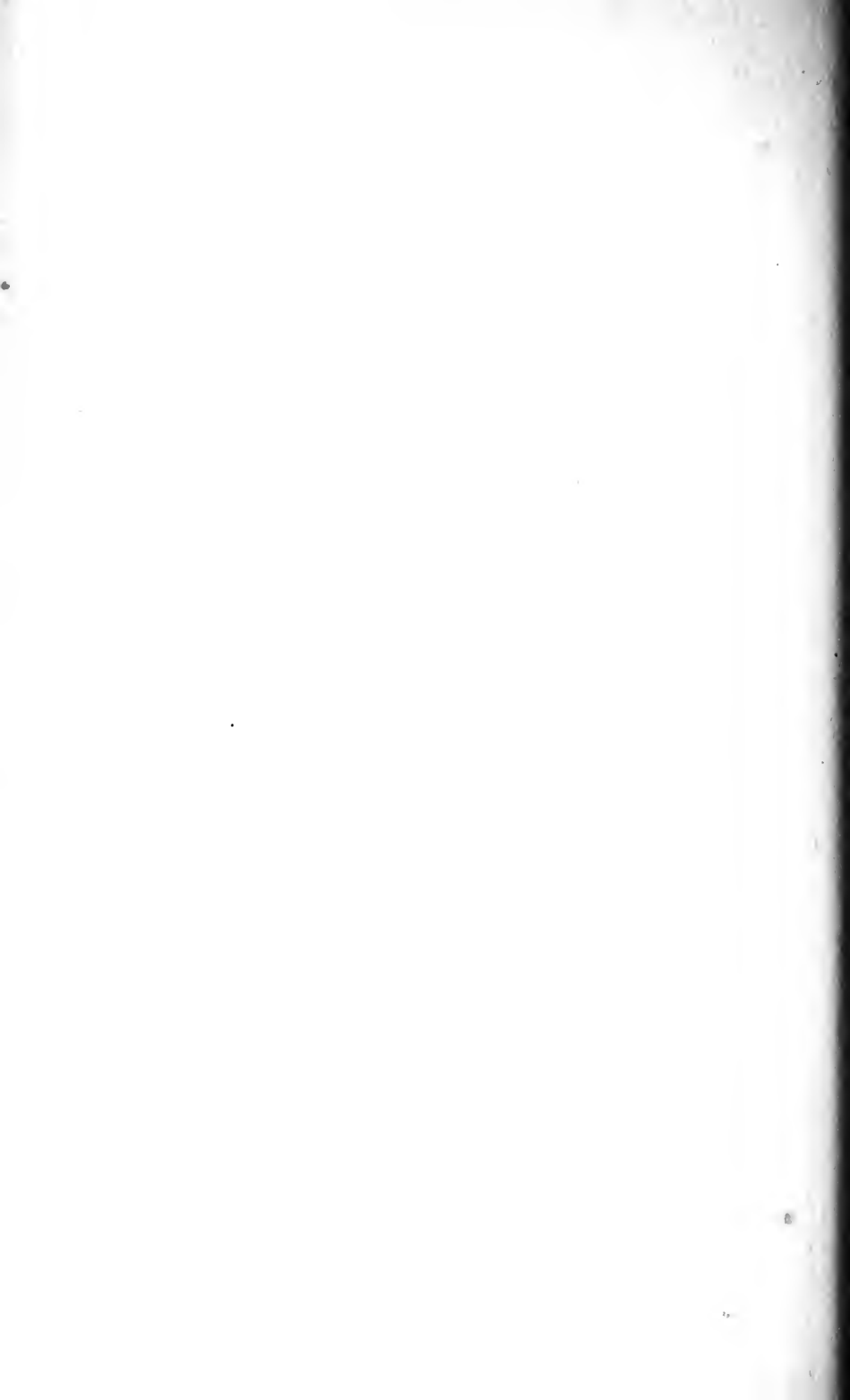
(signed) E. B. YERINGTON

Secretary

(signed) W. S. BLISS

President

[Endorsed]: U. S. B. T. A. Filed June 25, 1941.



(Testimony of William S. Bliss.)

PETITIONER'S EXHIBIT No. 15

CARSON AND TAHOE LUMBER AND FLUMING COMPANY

Petitioner's claimed fair value of land in Nevada and California
in the vicinity of Lake Tahoe as of March 1, 1913, and disposition thereof

Block No.	Acres	Lake Tahoe shore frontage feet	Disposition or explanation	Claimed fair value March 1, 1913			Sale Price
				Per acre	Per shore front foot	Total	
1	559	8,250	Owned 3/1/13. Value as appraised by W. S. Bliss....	\$10.00	\$2.50	\$27,500	
	40		Acquired by quiet title decree 1920.....			400	
	599	8,250				27,900	
	599	8,250	Distributed to stockholders 2/25/28.....			27,900	
2	2,210	3,300	Owned 3/1/13. Value as appraised by W. S. Bliss....	10.00	5.00	58,500	
	396	6,000	Acquired by quiet title decree 1920, net.....			34,200	
	2,606	9,300				92,700	
	42 $\frac{2}{3}$	800	Sold to E. G. Schmeidel 1921.....			3,563	\$3,563.00
	2,601 $\frac{1}{3}$	8,500				89,137	
	922		Sold to Chas. L. Fulstone 1922.....			5,993	5,301.50
	1,679 $\frac{1}{3}$	8,500				83,144	
	1,679 $\frac{1}{3}$	8,500	Distributed to stockholders 2/25/28.....			83,144	
3	1,343	3,120	Owned 3/1/13. Value as appraised by W. S. Bliss....	5.00	2.50	14,500	
	292	2,730	Acquired by quiet title decree 1920.....			8,285	
	1,635	5,850				22,785	
	1,160		Sold to Chas. L. Fulstone 1/2/20.....			5,800	4,965.00
	475	5,850				16,985	
	475	5,850	Distributed to stockholders 2/25/28.....			16,985	
4	3,172		Owned 3/1/13. Value as appraised by W. S. Bliss....	8.00	2.50	25,000	
	25	3,500	Lost by quiet title decree 1920, net..... (gained shore footage)			8,550	
	3,147	3,500				33,550	
	1,634		Sold to Chas. L. Fulstone 1/2/20.....			13,072	11,089.00
	1,513	3,500				20,478	
	802	3,500	Distributed to stockholders 2/25/28.....			14,790	
	711					5,688	
	711		Sold Jan. 1938 to Geo. Whittell.....			5,688	
5	2,265		Owned 3/1/13. Value as appraised by W. S. Bliss....	10.44		23,500	
	40		Lost by quiet title decree 1920.....			400	
	2,225					23,100	
	120		Sold to Glenbrook Improvement Co. 1924.....			2,175	2,600.00
	2,105					20,925	
	1,080		Distributed to stockholders 2/25/28.....			10,675	
	1,025					10,250	
	1,025		Sold Jan. 1938 to Geo. Whittell.....			10,250	

(Testimony of William S. Bliss.)

Petitioner's Exhibit No. 15—(Continued)

Block No.	Acres	Lake Tahoe shore frontage feet	Disposition or explanation	Claimed fair value March 1, 1913			Sale Price
				Per acre	Per shore front foot	Total	
6	1,985	1,350	Owned 3/1/13. Value as appraised by W. S. Bliss....	\$6.50	\$3.00	\$16,500	
	164		Land owned—omitted from appraisal of W. S. Bliss			1,520	
	2,149	1,350				18,620	
	80		Sold to M. and R. Bigot 4/19/17.....			1,900	
	2,069	1,350				17,920	
	40		Lost by quiet title decree 1920.....			260	
	2,029	1,350				16,760	
	640		Distributed to stockholders 2/25/28.....			3,681	
7	1,389	1,350		9.00	3.00	13,079	
	1,389	1,350	Sold Jan. 1938 to Geo. Whittell.....			13,079	
	1,272	4,000	Owned 3/1/13. Value as appraised by W. S. Bliss....			23,000	
	200		Acquired by quiet title decree 1920.....			1,700	
	1,472	4,000				24,700	
	80	1,350	Sold to R. de Longchamps 7/11/29.....			5,788	
	6		do			39	
	1,386	2,650				18,873	
8	1,386	2,650	Sold Jan. 1938 to Geo. Whittell.....	8.80	4.35	18,873	
	1,586	4,290	Owned 3 1/13. Value as appraised by W. S. Bliss			32,500	
	27	1,320	Sold July 1926 to George Malley.....			7,416	
	1,559	2,970				23,084	
	88	1,240	Sold 6, 4/28 to R. de Longchamps.....			8,710	
	1,471	1,730				16,374	
	1,471	1,730	Sold Jan. 1938 to Geo. Whittell.....			16,374	
	1,381	2,760	Owned 3 1/13. Value as appraised by W. S. Bliss....			28,500	
9	416	2,760	Sold 11 1/23 to C. L. Fulstone.....	11.45	5.00	18,850	9,000.00*
	965					9,650	
	965		Sold Jan. 1938 to Geo. Whittell.....			9,650	
	2,609	9,250	Owned 3/1/13. Value as appraised by W. S. Bliss....			68,500	
	37	2,000	Sold 6, 27/22 to R. A. Hardy.....			3,110	
10	2,572	7,250		8.65	5.00	65,390	
	76	1,000	Sold Nov. 1924 to C. L. Fulstone.....			6,930	
	2,496	6,250				58,460	
	2,496	6,250	Sold January 1938 to Geo. Whittell.....			58,460	

*Also received consideration of advertising.
Land resold for \$18,000.

(Testimony of William S. Bliss.)

Petitioner's Exhibit No. 15—(Continued)

Block No.	Acres	Lake Tahoe shore frontage feet	Disposition or explanation	Claimed fair value March 1, 1913			Sale Price
				Per acre	Per shore front foot	Total	
11	2,898	4,660	Owned 3/1/13. Value as appraised by W. S. Bliss....	\$6.90	\$4.00	\$35,500	
	10		Acreage omitted from appraisal.....			60	
	2,908	4,660				38,560	
	640		Sold 9/24/13 to W. F. Detert✓.....			3,840	\$3,840.00
	2,268	4,660				34,720	
	40		Sold 5/14/19 to G. R. Cowgill✓.....			240	240.00
	2,228	4,660				34,480	
	40		Sold 10/1/20 to Norman de Vaux✓.....			240	400.00
	2,188	4,660				34,240	
	44	2,000	Sold 10/23/24 to Norman de Vaux.....			9,200	3,000.00
	2,144	2,660				25,040	
	80		Sold 11/3/24 to C. L. Fulstone.....			480	240.00
12	2,064	2,660				24,560	
	320		Sold July 1931 to Arthur K. Bourne.....			1,920	3,200.00
	1,744	2,660				22,640	
	1,744	2,660	Sold Jan. 1938 to Geo. Whittell.....			22,640	
	4,008		Value as appraised by W. S. Bliss.....	6.50		26,000	
	2,684		Deduct land of El Dorado Wood & Plume Co. included			17,393	
	1,324		Owned 3/1/13 at value as appraised by W. S. Bliss	6.50		8,607	
	444		Sold 3/1/17 to A. L. Dressler.....			2,886	2,215.75
	880					5,721	
	160		Lost by quiet title decree 1920.....			1,040	
	720					4,681	
	40		Distributed to stockholders 2/25/28.....			260	
	680					4,421	
	680		Sold 1938 to U. S. Government.....			4,421	

(Testimony of William S. Bliss.)

Petitioner's Exhibit No. 15—(Continued)

Lake Tahoe shore frontage feet			Claimed fair value March 1, 1913				
Block No.	Acres		Disposition or explanation	Per acre	Per shore front foot	T	Sale Price
13	6,090	2,200	Value as appraised by W. S. Bliss.....	\$9.00	\$1.00	\$57,000	
	398		Land owned but not included in appraisal.....			3,592	
	6,488					60,592	
	4,579		Deduct land of El Dorado Wood & Flume Co. included.....			41,211	
	1,909	2,200	Owned 3 1, 13 at value as appraised by W. S. Bliss.....			19,481	
	40		Acquired by quiet title decree 1920, net.....			360	
	1,949	2,200				19,741	
	509	2,200	Sold 7 21 22 to John E. Dunlap.....			6,781	\$6,527.00
	1,440					12,960	
	80		Sold 7 25 22 to W. D. Barton.....			1,000	1,000.00
	1,360					11,960	
	280		Sold 1 15 26 to W. D. Barton.....			2,520	3,500.00
	1,080					9,440	
	80		Sold March 1931 to Geo. O. Kyburz.....			720	700.00
14	1,000			12.50	1.00	8,720	
	960		Sold 1938 to U. S. Government.....			8,360	
	40		Balance owned 12 31 '38.....			360	
	2,403	3,300	Value as appraised by W. S. Bliss.....			32,500	
	508		Land owned but not included in appraisal.....			6,350	
	2,911	3,300				38,850	
	392	1,900	Deduct land of El Dorado Wood & Flume Co. included.....			5,963	
	2,519	1,400	Owned 3 1, 13 at value as appraised by W. S. Bliss.....			32,887	
	808		Sold March 1919 to J. C. Scott.....			10,100	10,000.00
	1,711	1,400				22,787	
	80		Acquired by quiet title decree 1920.....			1,000	
	1,791	1,400				23,787	
	120		Sold March 1922 to C. G. Celio.....			1,500	1,500.00
	1,671	1,400				22,287	
991	1,400	Sold 7 21 22 to John E. Dunlap.....	13,787	13,453.00			
680			8,500				
80		Sold March 1931 to Geo. Kyburz.....	1,000	\$80.00			
600			7,500				
600		Sold 1938 to U. S. Government.....	7,500				

(Testimony of William S. Bliss.)

Petitioner's Exhibit No. 15—(Continued)

Block No.	Acres	Lake Tahoo shore frontage feet	Disposition or explanation	Claimed fair value March 1, 1913			Sale Price
				Per acre	Per shore front foot	Total	
15	242	8,600	Owned 3/1/13. Value as appraised by W. S. Bliss....	\$30.17	\$25.00	\$28,500	\$1,000.00
	80		Sold Nov. 1921 to G. A. Newhall.....			800	
	162	8,600				27,700	
	162	8,600	Distributed to stockholders 2/25/28.....			27,700	
16	880		Owned 3/1/13. Value as appraised by W. S. Bliss....	7.50	1.00	6,500	10,000.00
		5,000	Add for value of shoreline omitted from appraisal			5,100	
	880	5,000				11,600	
	800	5,000	Sold 9/1/29 to D. H. Chambers.....			11,600	
	80		Balance owned 12/31/38.....			600	
17	438	1,800	Owned 3/1/13. Value as appraised by W. S. Bliss....	17.42	10.00	25,500	25,000.00
	160		Lost by quiet title decree 1920.....			1,600	
	278	1,800				23,900	
	118	1,800	Sold 6/5/28 to R. Kerman, Jr. and F. R. Short.....			22,430	
	160		Balance owned 12/31/38.....			1,470	
18	480		Owned 3/1/13. Value as appraised by W. S. Bliss.... (incl. water rights)	20.00		10,500	
	480		Owned 12/31/38.....			10,500	
19	2,576	8,600	Owned 3/1/13. Value as appraised by W. S. Bliss....	12.50	5.12	75,500	65,000.00
	2,576	8,600	Sold Jan. 1917 to Lora J. Moore.....			75,500	
20	3,350	2,000	Owned 3/1/13. Value as appraised by W. S. Bliss....	12.47	7.50	58,000	34,540.00
	3,040		Sold August 1923 to Crown Willamette Paper Co....	12.50		38,000	
	310	2,000				20,000	17,000.00
	310	2,000	Sold October 1935 to F. A. Kilner.....			20,000	
21	1,975	3,100	Owned 3/1/13. Value as appraised by W. S. Bliss....	22.00	10.00	75,000	15,675.00
	1,360		Sold August 1923 to Crown Willamette Paper Co....	12.50		17,000	
	615	3,100	Balance owned 12/31/38.....	42.92		58,000	

(Testimony of William S. Bliss.)

Petitioner's Exhibit No. 15—(Continued)

Block No.	Acres	Lake Tahoe shore frontage feet	Disposition or explanation	Claimed fair value March 1, 1913			Sale Price
				Per acre	Per shore front foot	Total	
22	681	5,300	Owned 3/1/13. Value as appraised by W. S. Bliss....	\$10.00	\$25.00	\$27,000	
	63		Acquired by quiet title decree 1920.....			630	
<hr/>		<hr/>				<hr/>	
744		5,300				27,630	
558			Sold August 1923 to Crown Willamette Paper Co.....			5,580	\$4,785.00
<hr/>		<hr/>				<hr/>	
186		5,300				22,050	
40		1,325	Sold 1/7/28 to Lora J. Knight.....			3,713	10,000.00
<hr/>		<hr/>				<hr/>	
146		3,975				18,337	
146		3,975	Distributed to stockholders 2/25/28.....			18,337	
<hr/>		<hr/>				<hr/>	

[Endorsed]: U.S.B.T.A. Filed June 25, 1941.

(Testimony of William S. Bliss.)

Q. (By Mr. Helvern) Then, when you valued this land, Mr. Bliss, you thought you were pretty well experienced with the valuation of land?

A. Yes, sir.

Q. Did you know anything about what the company was selling its land for and had heretofore sold its land for? What prices? Were you familiar with that? [84]

A. Before I came in?

Q. Yes.

A. Yes. They were sold very cheap. All lands around the lake were very cheap, and I looked the thing over and decided that it wasn't enough and put these prices on.

Q. You did put these prices on?

A. From what I found out.

Q. You say from what you found out?

A. Yes.

Q. Did you make it a point to try and find out what prices should be put on the land?

A. Well, I inquired around.

Q. Yes.

A. Or heard of prices of sales.

Q. And did you devote considerable time and attention and hard work to making this, or didn't you? Did you just do it in a cursory manner?

A. All my time.

Q. All your time in making the appraisals. Did you know other land owners around Lake Tahoe?

A. Yes.

(Testimony of William S. Bliss.)

Q. And you were familiar with their lands. And were you familiar to any extent with the selling prices obtained by them for their lands?

A. I don't remember 30 or 40 years back. [85]

Q. You don't remember now. Mr. Bliss, then in your opinion this appraisal made by you was correct at the time? A. Yes, sir.

Mr. Murray: If your Honor please, I will have to ask that the witness not be led so much.

The Member: Yes. I would like to urge counsel not to do that, too, any more than is necessary.

Mr. Helvern: All right.

Q. (By Mr. Helvern) Mr. Bliss, you have stated that the company had no source of income after it ceased logging off its land in 1898 and after it sold certain of its property, it had no source of income except land sales. A. That's right.

Q. Did it have any particular expenses?

A. Lots of expenses.

Q. What sort of expenses?

A. Well, I went back to Washington to save the lake—to save it from draining.

Q. Draining?

A. Stone & Webster and the Reclamation Service were going to drain that lake a hundred feet, someone told me, and that cost considerable money and took a man with me, and then——

The Member: (Interposing) What was the idea of draining it?

The Witness: Oh, they were going to take it

(Testimony of William S. Bliss.)

into [86] Washoe Valley and get a thousand feet fall and use the water in Nevada. But the fact of the matter was that they were going to take it into Rubicon and get six thousand feet of fall, so I found out. Stone & Webster do the work and get the power, and the Reclamation Service was to use it, and very likely come into the Central Valley now.

Q. (By Mr. Helvern) They did not accomplish that purpose? A. No, they didn't.

Q. When did this occur? What year?

A. Well, it started away back in 1902 or '3, I think. But I didn't take hold of it at that time.

Q. What other expenses did they have besides paying these expenses?

A. Taxes, and we had declared some assessments once in a while. Some of the stockholders were awfully hard up.

Q. The stockholders were what?

A. Hard up.

Q. Very hard up.

A. They were coming at me for dividends.

Q. But you had no money for dividends?

A. No, except from the sale of the land.

Q. Well, what did they do to raise money?

A. Sold the land.

Q. Mr. Bliss, without being charged with leading you, what was the purpose of this agreement to sell all the lands [87] of the company? What was the immediate purpose?

A. To get the money.

(Testimony of William S. Bliss.)

Q. They wanted a lot of money, did they?

A. Yes.

Q. It would have produced a lot of money if they had sold it. Did that need for money continue with the stockholders and the directors?

A. All the time.

Q. All the time. Mr. Bliss, did you receive a salary as president?

A. No, no salary.

Q. Did you render lots of services?

A. I gave all my time to it a good part of the time.

Mr. Helvern: All your time.

The Member: Mr. Helvern, I think we will take a recess now.

(Whereupon a short recess was taken after which the proceedings were resumed as follows:)

Q. (By Mr. Helvern) Mr. Bliss, I hand you Exhibit 15.

This is already Petitioner's Exhibit in evidence, your Honor.

This Exhibit 15 you have not familiarized yourself with particularly, Mr. Bliss, but it shows the block numbers of your land, the amount of acreage, shore frontage feet and valuation; and it also shows in red all sales and other dis- [88] positions made of those lands down to the end of the year 1938. I am going to ask you some questions about those sales. This, the red figures in this column represent the amount that the company charged off as the March 1, 1913 value according to your appraisal as

(Testimony of William S. Bliss.)

the cost of those lands. The black figures under "sale price" indicate how much you received for it as per the company records. These are the figures shown by the books and checked. Mr. Bliss, you made certain sales to Fulstone, one Fulstone, in Blocks 2, 3, 4, 9, and 10; 2, 3, 4, 9 and 10. These sales were made at something of a loss over the figure—something less——

Mr. Murray: (Interposing) If your Honor please, I should like to object to this leading. Now, he has the thing in front of him there and I object to the leading questions.

Mr. Helvern: If your Honor please, I didn't want to go into every sale on this list, but I did want to take some representative large sales at a profit, some large sales at a loss. Government counsel may ask the witness any questions regarding any other sales shown on this list. If I do not designate the sale it will take an extremely long time for the witness to find the sales that I am referring to.

The Member: All right. Go ahead.

Q. (By Mr. Helvern) These sales to a Mr. Fulstone, are you [89] familiar with those, Mr. Bliss?

A. Yes, sir.

Q. In what year were they made? You can refresh your mind by looking at the date. Fulstone sales in Blocks 2, 3, 4, and 9.

A. Is this date given here? Oh, yes.

Q. Yes, sir.

A. Here it is. '22 and '20 and '20 again, and——

(Testimony of William S. Bliss.)

Q. (Interposing) Well, these sales were generally in '20 and '22, were they not, Mr. Bliss?

A. Here is one '23.

Q. And in Blocks 9 and 10, those are the last ones? A. '23 again and in '24.

Q. From '20 to '24 would you say, Mr. Bliss, the sales were made to Mr. Fulstone? A. Yes.

Q. Those sales for the most part were made at something at a loss over your estimated fair value?

A. Yes.

Q. Do you recall that that is true? A. Yes.

Q. And it is shown by the statement. What was the reason why those sales were made at something less than you appraised the land?

A. Well, I had a number of stockholders after me for divi- [90] dends. I remember getting a letter from one of the Yeringtons asking for a thousand dollars, "For heaven's sake!" to get it for him. We made the sales and then we had a lot of expenses and I had to keep money ahead. For instance, a little quick trip to Washington, I had to have some money to go on.

Q. You made them at a lower price because you had to have the money, is that so?

A. Yes. Well, that's about correct.

Q. Now, Mr. Bliss, to save time, you made some sales to Crown Willamette Paper Company?

A. Yes.

Q. In Blocks 20, 21 and 22. Will you refer to Blocks 20, 21 and 22? A. Yes, I know that.

(Testimony of William S. Bliss.)

Q. You will find these sales, I believe, were made at a loss also; perhaps a ten per cent loss from your appraisal.

A. Do you want the dates? '23. Well, they were all in '23, yes.

Q. All sold in '23 to Crown Willamette. Does that schedule show that they were sold at a loss?

A. To the Crown Willamette?

Q. Yes, sir.

A. Yes. That was sold at a loss.

Q. Was there a large amount of money involved?

[91]

A. Considerable, yes.

Q. How much money approximately?

A. Oh, \$60,000-odd.

Q. In sales price? A. Yes.

Q. I think that you agree and I recall that those sales were made at a loss also of ten per cent or possibly more? A. Yes.

Q. Why were those sales made at a loss in 1923 and how do you explain that?

A. Well, it was a big bunch of land, for one thing.

Q. A large quantity was sold?

A. It was quite an acreage.

Q. Yes.

A. And we would have liked to have sold the whole thing, of course. And then I had them after me all the time and this expense for keeping the lake in shape. If they drained that lake it would just ruin the land.

(Testimony of William S. Bliss.)

Q. You needed the money, and you say "they" were after you. Who? The stockholders?

A. The stockholders.

Q. Yes, sir. And you had to have the money?

Mr. Murray: If your Honor please, I will just have to ask that this be brought out by testimony of the witness.

The Member: Yes. It is all right to lead on preliminary matters, that is, with regard to pointing out to the [92] witness what is in the exhibit. As I understand it, this exhibit is already admitted into evidence. But when it comes to the ultimate questions to be asked, counsel should refrain from leading.

Mr. Helvern: I was just going to save a little time, your Honor.

The Member: Yes.

Q. (By Mr. Helvern) Mr. Bliss, I will mention three more sales in the same class as those we have discussed. Norman de Vaux in Block 11 and also two to Lora J. Moore in Block 19 and R. A. Hardy in Block 10. Would you mind referring to those sales and tell us if they do not reflect a loss?

A. Yes, I remember that one.

Q. You recall the sale. And without leading you, what was the reason for selling those lands at a loss, or what is your explanation?

A. Well, it's the same as selling the other lands at a loss.

Q. Yes. Well, that's enough. Mr. Bliss, we now go to another type of sales. In Block 22 in 1928

(Testimony of William S. Bliss.)

you sold some land to Lora J. Knight, in Block 22.

Would you mind referring to that sale?

A. I know it. I remember the land.

Q. You remember it? A. Yes.

Q. What was the approximate selling price of that land? [93] A. Ten thousand.

Q. What was the cost shown on that statement in red, Mr. Bliss, right opposite the selling price?

A. In red?

Q. Yes, sir. A. In red?

Q. In red right against the selling price.

A. \$3,713.

Q. Sold for \$10,000 and \$3,713? A. Yes.

Q. Explain the profit on that sale.

A. Well, Block 22 consisted of a great many acres and this lot I sold to Mrs. Moore at 40 acres in it. When I put the '13 price on it I hadn't looked over this special 40 acres. When I did look it over I found that there was a little beach in there, a cove, and it was more valuable than the rest of the land. So I asked that price.

Q. Yes. You overlooked this particular factor in March, 1913? A. Well,— (Pause).

Q. Why did you overlook it?

A. I didn't go over every 40 acres of the 44,000.

Q. Mr. Bliss, we have a sale in Block 17 to Kerman and Short. Block 17 to Kerman and Short. Perhaps you remember that one. [94]

A. Block 17?

Q. Yes, sir. A. Yes.

(Testimony of William S. Bliss.)

Q. And what was the selling price of that piece of land? A. Here it is. \$25,000.

Q. \$25,000? A. Yes.

Q. What was the cost, in red opposite that?

A. \$22,430.

Q. Is there any explanation for that sale at a profit over your estimate?

A. That was in '28. I know I was dickering with them about it, but whether I made the sale I am not sure. But I will tell you about it.

Q. Yes. Excuse me, you did not make that sale, Mr. Bliss. A. No.

Q. You did not make that sale. A. Oh.

Q. You had separated from the company at that time? A. Yes.

Q. Block 7 and 8, a sale to de Longchamps. I think that was one that you made. Do you remember it? A. Here it is.

Q. Yes. From your memory, and you can refresh it, how much was that sale for, Mr. Bliss? [95]

A. Well, I didn't make that sale either.

Q. You didn't. We will skip that. A sale in Block 13 to W. D. Barton. Block 13 to W. D. Barton. A. Yes.

Q. How much was that land sold for? It was sold you, was it not? 1926.

A. '22 and '26, two sales.

Q. Yes, sir.

A. Do you want the '22?

Q. That was sold for how much?

A. Sales price a thousand dollars.

(Testimony of William S. Bliss.)

Q. And what was the cost, Mr. Bliss?

Mr. Murray: I don't know what he means by "cost".

Mr. Helvern: The March 1, 1913.

The Member: The March 1, 1913 value as put upon it by the company itself.

Mr. Murray: O.K. That is swell.

A. It was a thousand dollars.

Q. (By Mr. Helvern) That was sold for just a thousand dollars. The other sale to Mr. Barton was—you mentioned another sale? A. \$3,500.

Q. The selling price. And the March 1, 1913 value of that, according to the company?

A. \$2,520. [96]

Q. Pardon me? A. \$2,520.

Q. March 1, 1913 value \$2,520, sold for \$3,500?

A. Yes.

Q. I think that is all we need of that. Mr. Bliss, in view of the sales which you have reviewed and that have occurred afterwards, would you reasonably have expected certain discrepancies up and down in the selling price of the property which you valued?

A. Oh, there are bound to be in all sales.

Q. Yes.

A. When you come to remember back 30 or 40 years, it is pretty hard to say just the exact reason.

The Member: Does your company still own any land up there?

The Witness: Yes. This company owns it, but I am out of it now.

(Testimony of William S. Bliss.)

The Member: You are out of it?

The Witness: Yes.

The Member: Do you own any land up there

The Witness: No. Myself, personally?

The Member: Yes.

The Witness: No. Well, three of us are in a little subdivision. It doesn't amount to much, though.

Q. (By Mr. Helvern) Mr. Bliss, I hand you Exhibit 13. Would [97] you review that exhibit and tell us what it means, briefly?

A. Well, I will read it.

Q. All right. Read it.

A. "Resolved: That Carson and Tahoe Lumber and Fluming Company, represented by its truly qualified and acting officers, desiring to comply with the United States Income Tax Law, in order to arrive at the value of the Company's property as of March 1, 1913, does hereby fix as the actual value of its real estate holdings located in Washoe, Ormsby and Douglas Counties, Nevada and El Dorado and Placer Counties, California, as being of the value of \$260,000 as of date of March 1, 1913".

That date is January 29, 1918.

Q. Mr. Bliss, you said that that was in compliance with the United States Income Tax Law?

A. Yes.

Q. Do you know why the company entered that resolution other than what it says? You signed that resolution, Mr. Bliss? A. Yes.

Q. Do you remember anything in connection with it?

(Testimony of William S. Bliss.)

A. Well, as I remember, they had a \$2,000,000 valuation, didn't they, on it before then?

Q. It has been in evidence that originally they had \$2,000,000. [98]

A. After they went out of business in '98 they naturally considered the land wasn't so valuable. But why they put—well, maybe they put the \$260,000 because that's the first price on the stock in '73 that the company had. Just as they were going into business they had a value of \$260,000, and if they went out of business I suppose they went back to that same thing. I don't know, though.

The Member: When you say "went out of business", you mean went out of the lumber business?

The Witness: Yes. They closed the lumber business in '98.

Q. (By Mr. Helvern) You don't know any other reason why that was made? A. No.

Q. Mr. Bliss, on the face of it this states that that was a value at March 1, 1913 of these lands. Would you have sold any of these lands at March 1, '13 for \$260,000?

A. No. The stockholders couldn't put any other value on it, so they chose the first values.

Q. Mr. Bliss, you are no longer connected with the Carson and Tahoe Lumber and Fluming Company? A. No, sir.

Q. And when did you sever your connection with that company? A. In '28, I think.

Q. '28. What was the cause of your leaving

(Testimony of William S. Bliss.)

the Carson and [99] Tahoe Lumber and Fluming Company?

A. Well, the vice-president—I was the only one up to that time that was given permission to sell the land.

Q. You were the only one who had permission to sell land?

A. Yes, according to that list and so on. The vice-president wanted to sell some land, I thought, to some friends of his, and he insisted on my selling it at a much lower price than I would agree to. Then finally there were only three directors. He and the other director passed a resolution allowing the vice-president, that is, the vice-president himself, to sell the land and he finally did sell to his friend. And I enjoined them, and while—before the Judge had decided Mr. Ogden Mills came out and I had a talk with him and offered to turn our stock in, the three of us, my sister, my brother and myself, in exchange for land. And we dickered back and forth and finally made the exchange. We called it the Bliss Company, the land that we took over, and we gave our stock in the company. And I still continued to handle the Bliss Company, but I gave up the management of the old lumber company.

The Member: Pardon me. What connection did Ogden Mills have with it?

The Witness: Oh, D. O. Mills, his father, had a third interest in it.

The Member: Oh, I see. [100]

(Testimony of William S. Bliss.)

Q. (By Mr. Helvern) Mr. Bliss, I hand you Petitioner's Exhibit 14, minutes of a meeting of the Board of Trustees of the company, dated May 11, 1926. Will you tell me just what that resolution covers?

The Member: Is this Exhibit in evidence?

Mr. Helvern: It is in evidence, your Honor.

The Member: I assume that the Exhibit speaks for itself, then.

Mr. Helvern: Yes, it does.

Q. (By Mr. Helvern) Mr. Bliss, without taking the time to read that through, at the bottom of these minutes and added thereto is a statement signed by you. Would you mind reading this statement, that short statement signed by yourself in those minutes?

A. "I have subscribed to the above as being correct but wish to add that going prices the south-east quarter of southwest quarter of Section 27 Township 14 North Range 18 East is worth more than double the price the company is offering at and therefore I would note 'No' on the above resolution concerning the same."

Q. Do you recall to whom they were selling the same?

A. Yes. A man named George Malley.

Q. George Malley? A. Yes.

Q. You thought it should be sold for twice what they got for [101] the land?

A. That is correct, from that statement.

(Testimony of William S. Bliss.)

Q. This happened in 1926. But you stayed with the company for two years, and yet you objected to the sales of the land. What happened in the meantime? A. I think we made no sales.

Q. No sales? Why not?

A. Well, I was heading them off.

Q. How did you "head them off"?

A. Yes. He wanted to sell some land in Zephyr Cove to Malley, and I wouldn't sell it to him. I was at the time selling it. This was before Murphy took hold. I wouldn't sell it to him and that started things. Then he picked out this other piece in Cave Rock and finally did sell it.

Q. You mean they sold no lands in all that period from '26 to '28?

A. I don't remember whether we did or not.

Q. Well, Mr. Bliss, isn't it true that there was a reason why they couldn't sell those lands?

Mr. Murray: If your Honor please, the leading is going too strong again now.

Q. (By Mr. Helvern) Well, you don't know of any reason why they couldn't sell the lands?

A. Well, we were squabbling to beat the band.

Q. In what manner were you squabbling? [102]

A. The Directors. They wanted to sell at low prices and I objected.

Q. And you left the company? A. What?

Q. You left the company in 1928 and your brother and your sister left at the same time?

A. Yes.

(Testimony of William S. Bliss.)

Q. What happened at that time?

A. Well, we turned our stock in.

Q. And what did you receive for your stock?

A. For a certain amount of land.

Q. Certain lands? A. In Nevada.

Q. Mr. Bliss, I hand you again a copy of Exhibit 15. You will notice certain lands on there. Did you see which lands went to you and your brother and your sister at that time? You may find that in a distribution to stockholders, I believe, on that list. It is identified on that list, is it not? A. The distribution to stockholders?

Q. I just wanted to say there is a record of the land that went out to you and the other stockholders. A. Yes.

Q. Do you find it there?

A. Yes. Here it is, isn't it? [103]

Q. Yes, that is right. Mr. Bliss, you received certain lands. Do you still own those lands that you and your brother and your sister received?

A. No. We sold them.

Q. To whom did you sell them?

A. George Whittell.

Q. In what year?

A. Oh, I forget the years. I guess it was——

Q. (Interposing) Sir?

A. I forget the years.

Q. Yes. Did you sell it at a profit or a loss?

A. Profit.

Q. Over the March 1, 1913 value?

A. Profit.

(Testimony of William S. Bliss.)

Q. Did you sell those lands at a profit or a loss? A. At a profit.

Q. Are you familiar with the records of Bliss Company?

A. Speaking about "profit" or "loss", I'm talking about a profit over the 1913.

Q. Yes, sir. I realize that, Mr. Bliss. Mr. Bliss, tell me, you and your brother and your sister took certain of these lands? A. Yes.

Q. A large quantity of lands? A. Yes.

[104]

Q. (By Mr. Helvern) Mr. Bliss, you stated that you left the Carson and Tahoe because of controversies between yourself and the vice president and other trustees? A. Yes.

Q. Regarding sale prices to be charged for lands? A. That's it.

Q. You left them in 1928. But you specifically objected to a sale to one George Malley?

A. Yes.

Q. In 1926. Was that the first time that you had ever had any controversy with the other directors or stockholders or officers with regard to the selling price of those lands?

A. No. I got along with them in pretty good shape up to that time.

Q. You didn't object to any sales at a price lower than what you had determined?

A. No.

Q. And you have explained some of those. Mr.

(Testimony of William S. Bliss.)

Bliss, I show you a copy of page 103 of the minute book of the company, and I would like to have you read from the first full paragraph of that page of the minute book.

A. "Whereas, on July 26, 1926, William S. Bliss, Walter D. Bliss, Hope Bliss and C. T. Bliss, Stockholders in said [106] corporation and owners and in possession of 206 shares of the capital stock, commenced an action in the District Court of the United States in and for the District of Nevada against this company, and the Board of Trustees thereof asking, among other things, to enjoin them from selling the assets, the said suit being No. E-159, and that the said case was tried on the merits in September, 1926 and thereafter submitted for decision, but that the said case has never been decided; that ever since the beginning of said action and there is now an injunction issued in said case enjoining the trustees from selling all or any property of the company and liquidating it to the stockholders, and which said injunction further provided the trustees from considering offers for or negotiating sales of the property".

Is that enough?

Mr. Helvern: That is enough.

Do you wish any more of this put in the record?

Mr. Murray: Let me see it.

(The minute book referred to was passed to Mr. Murray.)

Q. (By Mr. Helvern) Mr. Bliss, from what

(Testimony of William S. Bliss.)

you have read it appears that you, your two brothers and your sister did commence a suit against the company enjoining them from the sale of lands? A. Yes.

Q. Isn't that so? [107] A. Yes.

Mr. Helvern: I have no further questions.

Mr. Murray: Before I would agree to this, I would like to have time to look at this to see if I want more of this minute in.

The Member: All right.

Mr. Helvern: I am not quite through with the witness.

The Member: All right. Do you have further questions, Mr. Helvern?

Q. (By Mr. Helvern) Mr. Bliss, has the Federal Government with regards to any valuations used by you in your income tax return——

A. (Interposing) I didn't understand you.

Q. Has the Government with respect to any valuations used by you in your income tax returns ever objected to the March 1, 1913 value used by you with respect to lands sold?

Mr. Murray: I object to that, if your Honor please, being absolutely, incompetent, irrelevant and immaterial to this case.

The Member: Objection sustained.

Mr. Halvern: Exception.

He is your witness, Mr. Murray.

Cross Examination

Q. (By Mr. Murray) Mr. Bliss, a while ago I understood you [108] to say that back around

(Testimony of William S. Bliss.)

1913 sometime, somewhere in the early days—I wasn't sure of the time—the land up there was pretty cheap, did you not?

A. They had been selling it before then at very low prices.

Q. What prices, for instance?

A. Oh, my father sold some land ten, fifteen years before I think for four or five dollars an acre or something of the kind; shore land or something of the kind.

Q. Some shore land for four or five dollars an acre?

A. Yes. They had no—they just wanted to liquidate, that was all.

Q. About what time was that, in period of time?

A. Well, it was before they shut down, I think, in '98.

Q. Well, in 1912 when you had before the company the matter of trying to liquidate the rest of the land, the 44,000 acres, what elements did you use in arriving at your figures that you gave them?

A. Well, I knew the land pretty well and I knew that some of the land was very valuable. So I put a certain value on the shore per foot, a certain value on acres for building sites, and then a lower value on back land.

Q. Did you have any idea at that time that the prices you put on in 1912—at the prices that you put on it could be sold immediately or anything like that?

(Testimony of William S. Bliss.)

A. I thought so, yes. In fact, Edwards and Brewster boosted [109] it up to me. They wanted the option on it and that was the understanding. They didn't get any commission on it. They were to sell at a profit.

Q. But they got an option on it only?

A. Yes.

Q. And they didn't ever exercise the option?

A. No.

Q. On anything. They didn't sell anything?

A. No, I think they had a customer, as they said, in one of the letters who was going to take it over. They thought they would make an immediate sale, but on account of the war emergency, or something of the kind the customer fell through. So they didn't make the sale.

Q. You read from Petitioner's Exhibit No. 9 the letter to yourself by C. M. Wooster, and I want to repeat a couple of the paragraphs preliminary to asking you a question. They were asking for an extension of thirty days on the option?

A. They were asking, I think, a year. We gave them thirty days.

Q. Oh, I see. They were asking for an extension? A. Yes.

Q. They hadn't done a thing on it? They hadn't bought anything or sold anything, is that right? A. No.

Q. And on April 5, 1913 they said to you in this letter [110] "I regret that nothing materially has been accomplished under the option. Diligent ef-

(Testimony of William S. Bliss.)

fort has been made but last year was one of liquidation generally throughout this country. It was characterized by conservatism in all branches of business, causing a peculiar money stringency and rendering impossible the floating of a project such as this, * * * *

“* * * * the change caused a general depression in financial affairs.

“We had a number of strong and influential men of affairs from Southern California over the ground and made every possible effort to bring about successful negotiations with this, but the atmosphere of the times was against this.

“I have had negotiations with some people of ample means to take over the project, but about the time they were ready to proceed in the matter, the money trust investigation gave further excuses for conservative methods.

“I have been disappointed in my own efforts, yet I believe it would have been impossible for anyone to have accomplished the sale of the lands during the past year * * *”

Now, that is the truth, isn't it?

A. I don't know. It was his belief.

Q. Well, isn't it your belief, too? Do you think that you could have sold it any better than he could? A. That's years ago. What's that?

Q. Do you think that you could have made any better attempt [111] to sell it than he did?

A. Well, I didn't want him to attempt it any more.

(Testimony of William S. Bliss.)

Q. That isn't answering my question. If you could have sold this property for any price at all back there you would have sold it, wouldn't you?

A. No, sir.

Q. Well, did you ever have any offers for anything of it around 1913?

A. The whole land?

Q. Yes, the whole land. A. No.

Q. There just weren't any offers that you heard of? A. What is that?

Q. You didn't receive any offers?

A. No. Edwards and Brewster were the only ones figuring on taking it all.

Q. Yes. But they very definitely didn't do anything with it? That's right, isn't it?

A. No. That's quite right.

Q. Now, you had some kind of an agreement dated 1912 with the company whereby, if the lands were sold at these prices which you suggested you would get ten per cent commission. That's right, isn't it? A. Yes.

Q. Well, that was a five-year contract, wasn't it? [112] A. Yes, I believe so.

Q. Well, why was the five-year element placed in there?

A. I haven't any idea, except that we wanted to sell it and thought we could sell it.

Q. Well then, these prices that you hoped to get were something that you hoped to get over the five-year period, wasn't that so?

(Testimony of William S. Bliss.)

A. Yes. After talking with Edwards and Brewster they took their contract just about the same time and we talked it over before. They were going to sell it within a year, so I thought five years was enough.

Q. You mean they thought they were?

A. I don't know.

Q. They thought they were going to sell it?

A. They claimed they were.

Q. But they didn't sell anything, did they?

A. No, sir.

Q. Now——

A. (Interposing) And Edwards and Brewster were going to sell it for a higher price than I put on it.

Q. You mean they thought they were? They thought they were going to sell it?

A. They promised. They had to do it to make a profit.

Q. I see. But they didn't sell it?

A. No, sir. They didn't sell it. That's the fifth time, I think. [113]

Q. Now, Petitioner's Exhibit 13 in evidence, contains the resolution which says "The Carson and Tahoe Lumber and Fluming Company, represented by its duly qualified and acting officers, desiring to comply with the United States Income Tax Law in order to arrive at the value of Company's property as of March 1, 1913 does hereby fix as the actual value of its real estate holdings located in Washoe, Ormsby and Douglas Counties, Nevada and El Dorado and Placer Counties, California as being of the

(Testimony of William S. Bliss.)

value of \$260,000 as of the date of March 1, 1913."

Well, is there any reason to say that that doesn't mean what it says? In other words, the Company did determine then—they had another thought, and they decided to value their property as of 1913 at \$260,000? Isn't that right?

A. I believe so.

Q. Well then, how do you reconcile that with this estimation you had, that they ought to get \$778,000 out of it?

A. Well, I think they took the first \$260,000 when they started business and I don't think they paid any attention to my figures.

Q. You mean the Company didn't pay any attention to what you estimated it might bring?

A. No.

Q. They just disregarded it?

A. They hoped to get it if they could.

Q. They hoped to get all they could? [114]

A. Yes.

Q. But at this time they decided that \$260,000 was a pretty fair estimate of what the value ought to be?

A. I don't think they thought much about it.

Q. Well, that is what they said?

A. That is what they said.

Q. Did you vote on this resolution?

A. I think I did. I think I did.

Q. And it must have been your idea too?

A. I guess it was. But I didn't know of any other figure to put, maybe.

Q. What do you mean by that?

(Testimony of William S. Bliss.)

A. I mean that they chose the first. As they were going into business they weren't worth so much and they had it at \$260,000, the incorporated price, and then as they advanced they made money and they put the price up to two million and something. After they went out of business they got back to the same state that they were in when they started. That's as I look at it. I don't know what happened.

Q. They must have had some idea that the land wasn't worth at the most in excess of \$260,000 when they reduced the capital stock to that, didn't they?

A. I don't think they had any idea about it.

Q. Why did they put on a figure of \$260,000 back in 1907?

A. As I say, they went back to the old figure.

Q. I say the evidence shows that it was in 1917 when they did [115] reduce the stock to 260. What was the basis for that?

Mr. Helvern: I object. The evidence does not show just what counsel has said.

The Member: It was 1907, wasn't it?

Mr. Helvern: I have a general entry that the Company set on the books a figure as the value of the land, and the figure is \$260,000.

Mr. Murray: If your Honor please, I refer to Exhibit 1, which is a minute of the meeting of December, 1917, in which they ordered that the capital stock be reduced to \$260,000.

The Member: I thought it was 1907. I think your question was 1917. That was a mistake.

(Testimony of William S. Bliss.)

Mr. Murray: Oh, I beg your pardon.

Mr. Helvern: I thought counsel said "1917" rather than "1907".

The Member: I did, too.

Mr. Murray: I beg your pardon. I meant '7.

Q. (By Mr. Murray) They just didn't pull that figure out of the air, did they? How did they come at that? A. In 1907?

Q. Yes.

A. Well, I wasn't in the Company in 1907.

Q. Well, your testimony is to the effect that you became vice-president in 1907.

A. 1907? [116]

Q. 1907, the time your father died.

A. It was the time my father died. He died in September.

Q. You mean you were in the Company a little later in the same year?

A. Well, I took my father's place. He died two days before Christmas, 1907.

Q. Did anything happen between 1907 and 1913 that would change the value of lands in Douglas County between 1907 and 1913?

A. Well, I don't know, but the taxes might have shown.

Q. You don't know what?

A. The taxes on it. They went up. The taxes went up, the County taxes.

Q. What were the County taxes in that period, do you recall? A. No, I don't.

Q. If I should tell you that in 1910 and '11 they

(Testimony of William S. Bliss.)

were 40 cents and 20 cents an acre, would you think that's about right?

A. No. I think as a rule they had the back land at \$2.00 an acre and front land ran from one hundred to two hundred dollars an acre.

Mr. Helvern: I object. I want to get the meaning of this question.

The Member: Do you mean the appraisement for taxation?

Mr. Murray: I meant the basis on which the tax was computed. That is what I meant. I can prove it later. I want [117] to test his memory.

The Witness: The tax value?

Q. (By Mr. Murray) The value that was used by the assessor to compute taxes. A. Yes.

Q. I will ask the question again, and if you can't answer it I can prove it later.

A. What date?

Q. In 1910 and '11—withdraw that question.

If I tell you that in 1912 and '13 the lands of Carson and Tahoe Lumber and Fluming Company were assessed at the rate of \$1.25 an acre, would that sound like your memory?

A. Yes, something like it.

Q. And also at the time either for—

A. (Interposing) That's the back land. The front land was much higher.

Q. Is it your testimony that it was taxed in 1913 at a much higher rate?

A. I don't remember just the year, but I know now that they were taxing that front land, some of

(Testimony of William S. Bliss.)

the Counties, at \$150; I think one county at \$200 an acre.

Q. Well, when is it your understanding that they did anything like that? You mean now?

A. They are doing it now and they have been doing it for a number of years. [118]

Q. Oh, yes. Now. But you don't know how long ago or anything like that? A. No.

Q. Mr. Bliss, you say your father died in 1907?

A. Yes.

Q. Do you know what real property he had at the time of his death? A. How's that?

Q. Do you know what real property your father had at the time of his death?

A. Well, he had a house in Carson. You mean real property?

Q. Real property. I mean, limit it up to the lake Tahoe.

A. Well, he had a house up there.

Q. Where was his house?

A. At Glenbrook.

Q. At Glenbrook. And approximately how much land was involved in the home? Is that what you call the home place? A. Yes.

Q. Approximately how much land was involved in the home place? A. Part of an acre.

Q. What is that? A. Part of an acre.

Q. About an acre?

A. No. Less than an acre. [119]

Q. Is that all the land that he owned?

(Testimony of William S. Bliss.)

A. Well, he was interested in the stock, in the company.

Q. No. But I mean of his own ownership?

A. I think he was interested in some back land; 40 acres or 80 acres or something of the kind. I don't remember, though.

Q. Well, at the time of your father's death did he not own an interest in a portion of Zephyr Cove?

The Member: What cove?

Mr. Murray: Zephyr Cove.

The Member: Zephyr Cove?

Mr. Murray: If your Honor please, that is a very important spot on this.

A. As I remember it, only the company owned the land.

Q. (By Mr. Murray) Well, I will show you what purports to be an inventory and appraisement of your father's estate. Did you have anything to do with the handling of your father's estate?

A. No. My mother.

Q. This document indicates that at the time of your father's death he owned a parcel of land which is set out by metes, bounds and feet, and so on, which I can't interpret into acres—I was hoping possibly you could—but it also shows two 40-acre sections of land, which I won't bother to describe now but which you are looking at, and it also says "Also an undivided one-half interest in the fractional east [120] half of north quarter and southwest quarter of northeast quarter; the northeast quarter of southwest quarter", and some more here,

(Testimony of William S. Bliss.)

of Section 10, Township 13, North Range 18 East, containing about 227½ acres. And if I tell you that that is the south half of Zephyr Cove——

A. (Interposing) I guess it is.

Q. Does it look like it to you?

A. I don't know whether there is any frontage there or not.

Q. Would that much knowledge——

A. (Interposing) That's about the location.

Q. Do you agree that your father had an undivided one-half interest in that property?

A. I don't remember anything about it.

Q. Then if I would tell you, further, that in 1910 no matter who owned this section it was appraised in your father's estate for \$2.00 an acre—that's not for the half interest, that's for the whole interest and he had a half of that—would you say that those appraisers were incorrect?

A. I would like to see what part of the map that's on and get a better idea of the acreage.

Mr. Murray: If your Honor please, at this stage I have two maps that I have had an engineer draw, one of my associates, and as soon as I can I would like to get them in evidence so that I can cross examine and use them later for my own witnesses. Counsel has not had an opportunity to check them, [121] but I don't want them to go in as proof of the facts. I have certain locations, different colors of property, and one thing and another, and I will tie it all in with other evidence. But at

(Testimony of William S. Bliss.)

this stage I would like to offer that map. In fact, it is two maps: One large-scale map, and one small-scale map. I would like to offer that map in evidence, if counsel doesn't object.

The Member: Are you through with the cross examination of this witness?

Mr. Murray: No, that at all.

The Member: Perhaps this witness can identify this particular property better from the map which he himself prepared. I think it is already in evidence. I just suggest to counsel that the witness probably could use his own map better.

Mr. Murray: May I look at these to see which might be the best?

The Member: Yes.

Q. (By Mr. Murray) I show you Petitioner's Exhibit 8, which I understand to be a map which you prepared yourself showing the way you blocked the Carson and Tahoe lands.

A. Now, what was that description?

Q. Well, it is in Section 10 in Township 13, Range 18.

A. Here's 10. What are the details?

Q. It says "Fractional east half of northwest quarter". [122]

A. "East half of northwest quarter"?

Q. Yes? A. Yes.

Q. That's right on the lake, isn't it?

A. Yes.

Q. "Southwest quarter of northeast quarter".

A. Yes.

(Testimony of William S. Bliss.)

Q. That's on the lake, too, isn't it? A. Yes.

Q. "Northeast quarter of southeast quarter."

A. Of southeast? Yes.

Q. "Northwest quarter of northeast quarter".

A. The what?

Q. "Northwest quarter of northeast quarter".

A. Yes, that's back land.

Q. "Northwest quarter of southeast quarter"?

A. Yes.

Q. That's all of Section 10. Now, what does that take in with respect to Zephyr Cove there?

A. It takes in pretty near all of it..

Q. Pretty near all of it? A. Yes. .

Q. Well now, if the property were reported in the inventory and sale—if I tell you that it was reported in the inventory and appraisalment of your father's estate, would you [123] have any doubt that he owned that half interest at that time?

A. Oh, I guess he owned it. This was in '7, wasn't it?

Q. This was in 1910 that this appraisal was made.

A. Of his estate?

Mr. Murray: I will show you this document.

May I have it marked for identification?

The Member: Let me see the map, Mr. Witness.

The Clerk: Respondent's A for identification.

(The map so offered for identification was marked "Respondent's Exhibit A".)

Q. (By Mr. Murray) This document I have been reading from is now marked for identification as Respondent's Exhibit A. Then you have identified

(Testimony of William S. Bliss.)

that property that I have read to you as pretty much all of Zephyr Cove there? A. Yes.

Q. Now, I think I will just let that rest for now.

A. Well, just a minute! You are speaking of those low prices. I told you a short time ago, or a while ago, that I revamped all those prices around the lake; that they had been very low for a long, long time.

Q. Yes. But I understood you to say that that was before 1900. This is 1910 now.

A. I am saying it before I made that list in 1912.

Q. Well, on what basis did you revamp those prices. I mean, on what basis did you revamp them? [124]

A. Well, they had been selling land there for anything they could get for it.

Q. Up to 1910, then, too?

A. Yes, and——

Q. (Interposing) Well, isn't that the best way to tell what land is worth, what you get for it?

A. Well, some of them had owned it for 30 or 40 years. In fact, we were interested in this lumber company since '71, you might say, and a great many got tired of holding it and when they had an offer of any kind they would let it go. And I decided that the whole thing was altogether too cheap.

Q. You decided to hold them?

A. To hold them? No. I decided that the prices were too cheap, and then Edwards and Brewster came around and I figured out these prices and they jumped at them.

(Testimony of William S. Bliss.)

Q. They "jumped at them". What do you mean? They didn't buy anything, did they?

A. They didn't, but they thought they would.

Q. But you didn't sell any of the land?

A. No, I didn't. That's the sixth time.

Q. Well, I want to make that very clear because you keep referring to it.

The Member: Was there any hotel on the lake in those days?

The Witness: Oh, yes. Comstock had a hotel there and [125] his father ran it before. There were little hotels around there.

Q. (By Mr. Murray) Those were on the California side, were they not?

A. Yes. There's Glenbrook, too.

Q. How much of a hotel was Glenbrook in 1910?

A. Well, the Comstock people put up what they called a "club". Sharon and Ralston and all those people belonged to the club. That was at Glenbrook. And they finally sold it for a hotel.

Q. Well, that was the only semblance of a hotel on the Nevada side in 1913, wasn't it?

A. Yes. About all there is now.

Q. Now, you don't think much of the Zephyr Cove hotel, then?

A. I have never seen it that I know of. I have been by it, through Zephyr Cove.

Q. Mr. Bliss, I show you a document which appears to be the capital stock tax return of Carson and Tahoe Lumber and Fluming Company for the

(Testimony of William S. Bliss.)

year 1916, and ask you if that is your signature?

A. Yes, sir.

Mr. Murray: I would like to offer this in evidence as Respondent's Exhibit.

Mr. Helvern: Your Honor, I object to the offer in evidence of that without examining it. I want to ask what is sought to be proved by this capital stock tax return. [126]

Mr. Murray: Contrary statements to what the witness is now testifying to.

Mr. Helvern: I have no objection to this going in an the capital stock tax return, but not as proving anything.

Mr. Murray: That is all I am interested in now.

The Member: It will be admitted in evidence.

The Clerk: "B".

(The capital stock tax return so offered and received in evidence was marked "Respondent's Exhibit B" and made a part of this record.)

Q. (By Mr. Murray) This capital stock tax return Respondent's Exhibit B, has a statement attached right above your name on it, which says: "This company is the owner of 35,000 to 40,000 acres of land situate around Lake Tahoe——"

A. (Interposing) What is the date of it?

Q. The return was sworn to January 25, 1915 and is the Federal Stock Tax Return for 1917.

I will repeat the statement.

It says "This Company is the owner of 35,000 to 40,000 acres of land situate around Lake Tahoe, at an elevation of from 6300 to 9000 feet above sea

(Testimony of William S. Bliss.)

level, which is rented for grazing purposes at the rate of 5 cts. to 7½ cts. per acre per year. This income will not pay expenses.

“In the last five years this Company has sold 640 acres, netting about \$5.00 per acre. Some of this land might answer for hotel sites, at a higher valuation, but would say [127] as a whole it could not be sold for over \$3.00 per acre if at that. Consequently have written in paragraph 8—520 shares at \$200.00 per share, equal to \$104,000.00”.

Why in 1917 were you saying that this 35,000 to 40,000 acres wouldn't sell for any more than \$3.00 per acre “if at that”, if you had an idea it was worth so much more?

A. I don't know. I made my list out and hoped to sell the land at that list price. But as a whole I don't know why that is there. I don't know who drew that up.

Did you draw that up?

Mr. Helvern: No.

Q. (By Mr. Murray) What do you say about it now? Is it your opinion now that the land was worth more than \$3.00 an acre in 1917?

A. All the land you mean?

Q. The whole land. A. You bet it was!

Q. Then you are retracting this statement that you made on here, is that it?

A. Well, that dates—now I say it is. I don't know about this statement.

Q. But you don't have any doubt but what you understood that when you signed the return, do you?

A. I guess I must have.

(Testimony of William S. Bliss.)

Q. So that was your idea at that time? [128]

A. I didn't draw it up.

Q. But this was your idea in 1917?

A. Yes, sir.

Q. Do you remember of a tax sale right in 1912 or '13 involving some property which had generally been claimed by Carson and Tahoe Lumber and Fluming Company? A. I don't recall it now.

Q. You don't remember of some acreage being sold for taxes early in 1913?

A. You mean the lumber company's tax?

Q. The lumber company's land.

A. Yes. I think in Douglas County.

Q. Yes, that is what I mean.

A. And I sent in, or the tax return came back so many acres in Section so and so and didn't designate the acreage—the quarter section, and it was sold at Sheriff's sale.

Q. Yes. That's a public sale?

A. Yes. And when I heard of it I asked them to get a deed from Dangberg, and they didn't want to. They said they would expunge it from the records. I said that wouldn't do us any good. I said "what about the Sheriff?" They finally got a deed from Dangberg and we paid the tax on it.

Q. This doesn't have to do with anything like that. This was some land sold to Mr. S. C. Bigelow, in 1913. Do you recall such an incident? [129]

A. No, I don't remember.

Mr. Murray: I would like to have this marked for identification as Respondent's Exhibit C.

(Testimony of William S. Bliss.)

The Clerk: "C".

(The statement so offered for identification was marked "Respondent's Exhibit C".)

Mr. Murray: There are two documents here. So I will ask that they be marked for identification as Exhibits C and D.

(The document so offered for identification was marked "Respondent's Exhibit D".)

The Member: You say you built that railroad down to Truckee?

The Witness: Truckee to Tahoe.

The Member: That is operated by the Southern Pacific now?

The Witness: Now, yes. We gave it to them.

The Member: Oh.

The Witness: To get a broad gauge in there and to sell the tavern, we gave the Southern Pacific for a dollar the road.

The Member: You sold the tavern to them?

The Witness: No. We sold it to Dolman, Drumm and Fleishhacker and five of them. What's that hotel man's name? I have forgotten. Five of them. Supposed to be wealthy men. [130] But they wouldn't do anything about it unless they had a broad gauge in. So we turned the railroad over to the Southern Pacific Company.

Q. (By Mr. Murray) Who was or is E. B. Yerington?

A. He was the son of H. M. Yerington, who was the president before me.

(Testimony of William S. Bliss.)

Q. That is, the father was president before you?

A. Yes.

Q. Do you know Mr. E. B. Yerington's signature?

A. Yes, sir.

Q. I show you a document which is a statement of taxable income of Carson and Tahoe Lumber and Fluming Company in Douglas County, Nevada, and ask you if that's Mr. Yerington's signature?

A. Well, it don't seem to be. It looks like it, yes. I guess it is. But I have seen a different "Y" on it, it seems to me.

Q. It is here twice.

A. I guess that's his signature.

Mr Murray: I offer in evidence a certified copy of the document which Mr. Bliss has just identified as having the signature of E. B. Yerington, the secretary of Carson and Tahoe Lumber and Fluming Company. It is a statement of taxable property belonging to or under the control of Carson and Tahoe Lumber and Fluming Company, Carson City, during the [131] year 1920. A certified copy.

The Member: No objection.

Mr. Helvern: No objection.

The Member: I accept it in evidence.

The Clerk: E.

(The document so offered and received was marked "Respondent's Exhibit E" and made a part of this record.)

Q. (By Mr. Murray) Mr. Bliss, this is another document that purports to be the statement of taxable

(Testimony of William S. Bliss.)

property of Tahoe Company for the year 1921, and I ask you if you can identify Mr. Yerington's signature. A. Yes, that is his.

Mr. Murray: I offer a certified copy of the statement of taxable property of Carson and Tahoe Lumber and Fluming Company, signed by E. B. Yerington, for the year 1921.

The Member: No objection?

Mr. Helvern: No objection.

The Member: Accepted in evidence.

The Clerk: F.

(The certified copy of statement of taxable property so offered and received in evidence was marked "Respondent's Exhibit F" and made a part of this record.)

Q. (By Mr. Murray) Mr. Bliss, how did the location of the home of your mother and father at Glenbrook, the land there, compare in value with other land along the lake shore? [132]

A. Well, that was sort of subdivision property. You can't compare it. Some of those subdivisions brought \$75 to \$80 a front foot.

Q. At what time?

A. Well, they are doing it now.

Q. Well, then?

A. This is away back years ago.

Q. And is it your testimony that it was as good or better or worse than the rest of the land along there?

A. You can't compare it, acreage land, with a town lot.

(Testimony of William S. Bliss.)

A. It is more valuable, is that your testimony?

A. Why, sure!

Q. And, of course, it was more valuable in 1913?

A. I don't know what he paid for it. It might have been given to him as far as that goes.

Q. Are you familiar with the property that was in your mother's estate when she died?

A. No. I was at that time.

Q. What is your memory as to the property on Lake Tahoe which she owned at the time of her death?

A. She owned stock, as far as I remember. Did she have any property on lake Tahoe?

Q. I show you what purports to be an inventory and appraisement of your mother's estate.

I ask that that be marked for identification, please, [133] as Respondent's Exhibit.

The Clerk: G.

(The inventory so offered for identification was marked "Respondent's Exhibit G.")

Q. (By Mr. Murray) And I show you in one page of this document which is now Petitioner's Exhibit G for identification, what is listed as the real property in your mother's estate at the time of her death, and ask you to look it over.

A. Well, I know about the lot.

Q. What is the lot? I mean, what do you mean you "know about the lot?" What is that place?

A. I know where it is and all about it.

Q. Is that the home place?

A. That is the home place.

(Testimony of William S. Bliss.)

Q. And that's the one that had more value than most of the things around there at that time in 1913, is that right?

A. Well, I suppose so. I don't know, but what's his name was anxious to have it then, and might have given it to him. That was bought in '84, I think.

Q. I am not speaking about it at that time.

A. Oh! Oh, I see.

Q. I am speaking about it at the time of your mother's death.

A. Yes.

Q. And that is the same place that came to your mother from your father at the time of his death, isn't it? [134]

Q. (By Mr. Murray) Mr. Bliss, Respondent's Exhibit B is the capital stock tax return of Carson and Tahoe Lumber and Fluming Company for the year 1913, which you identified by your signature on there, and wherein there was stated on the return that you signed—I will just read that one sentence—“Some of this land might answer for hotel sites at a higher valuation, but would say as a whole it could not be sold for over \$3.00 per acre if at that. Consequently have written in paragraph 8—520 shares at \$200.00 per share, equal to \$104,000.00.”

For the purpose of this return this 35 to 40,000 acres includes the land here in question, does it not?

A. I suppose it does, yes.

Mr. Helvern: Objection, your Honor. We are trying to prove something from a statement made

(Testimony of William S. Bliss.)

on a capital tax return [136] for a certain purpose for the Government. We are engaged here in a controversy relating to income taxes where valuations were made for an entirely different purpose. I object to this testimony as being irrelevant and incompetent with respect to proving values for income tax purposes.

The Member: The objection is overruled. I think it is proper cross examination.

Q. (By Mr. Murray) Then, to go on, as I understand your capital stock tax of this company for 1916 was valued at \$104,000, which is equal approximately to \$3.00 an acre for between 35 and 40,000 acres of land. Now, I call attention to what appears to be the capital stock stock tax return of Carson and Tahoe Lumber and Fluming Company for the year 1922, and I——

Mr. Helvern: (Interposing) Objection for the same reason, your Honor.

The Member: The same ruling.

Q. (By Mr. Murray) ——I ask you if that is your signature on there? A. Yes, sir.

Mr. Murray: I will offer this, if your Honor please, as Respondent's Exhibit.

The Member: The same objection?

Mr. Helvern: No objection to offering it as the capital stock tax return of the company. [137]

The Member: Admitted in evidence.

The Clerk: H.

(The capital stock tax return so offered and

(Testimony of William S. Bliss.)

received in evidence was marked "Respondent's Exhibit H" and made a part of this record.)

Mr. Helvern: I hold, however, that it is not competent or relevant and it is immaterial for the purpose of this particular case.

The Member: The same ruling.

Q. (By Mr. Murray) I am reading from a statement of this 1922 capital stock tax return, which is now marked as Respondent's Exhibit H, the following statement:

"The difference in the Book Value of the Capital Stock in 1921 Return, (\$260,000.00) and the 1922 Return (\$215,800.00) was brought about by a re-appraisal of the Company's lands and re-writing of the Company's books, on account of sales of Capital Assets (real estate) and distribution of the proceeds to the stockholders.

"The Fair Value of the real estate is placed at \$73,445.00 being the Fair Value as shown on the 1921 Return (\$90,000.00) less real estate sales during the year 1920 of \$16,555.00. The directors of the company consider this a fair value."

Now, this seems to be another valuation. And will you tell me what that is?

A. I couldn't tell you now. [138]

Q. Would you say that this was a valuation of those properties in 1922?

A. I can't say any more than that does. I don't remember anything about it now.

Q. Well, in any event the value for one purpose

(Testimony of William S. Bliss.)

would have to be the value for all purposes, isn't that right?

Mr. Helvern: I object.

The Member: That is argumentative.

Mr. Helvern: That is a conclusion and argumentative.

The Member: Sustained.

Mr. Murray: I withdraw the question.

Q. (By Mr. Murray) Mr. Bliss, I show you a letter to the Commissioner of Internal Revenue dated May 5, 1924, and I ask you if that is your signature at the end of that letter.

A. Yes, sir. [139]

Q. (By Mr. Murray) On page 1 of this letter to the Commissioner of Internal Revenue of May 5, 1924, the signatures to which you have identified, are the following statements:

“The Company had ceased logging operations in 1896 and since then had been renting its land for grazing purposes and selling the frontage, with at times the back land to control the water shed of the streams, for summer homes and resort purposes. Some of the back land had been sold for the timber remaining on it. It must be admitted that I did not know just how to go about getting the values as of May 1, 1913 on small parcels of land that the company might sell in the future without knowing the parcels, character of the land, location, metes and bounds and so forth. I stated that if all the stock of the Company could be sold at one sale for

(Testimony of William S. Bliss.)

cash I would advise the stockholders to accept the amount of the capitalization of the Company, which is \$260,000, [141] and it was decided this amount in case a sale was made on the above terms was the value of the land”.

Now, do you recall making those statements? Do you recall writing this letter?

A. Well, I wrote the letter no doubt.

Q. Yes. Well now, I would like to ask you, Mr. Bliss, what you mean by saying that you didn't know how to go about valuing the lands as of May 1, '13 without knowing the parcels, character of land, location, metes and bounds and so forth?

A. Well, in '25 Allen told me I hadn't blocked it out right, that I would have to get the price of each piece of land. I told him that I couldn't do it.

Q. Well, when you——

A. (Interposing) So I finally sort of picked out the small pieces as we sold and considered them as of a certain block.

Q. When you put those figures on in 1912 how did you do it? How did you arrive at those figures?

A. Well, mostly through Edwards and Brewster, I think. They had been talking with me about buying it. So I figured out a list as to what we would do and they accepted the list.

Q. Well, did you ever go over this land at that time or anywhere near that time?

A. I have been over nearly all of it, yes. But I hadn't gone over every 44 acres of 44,000 acres. [142]

(Testimony of William S. Bliss.)

Q. Well, what did you mean by saying "I had decided that if all the stock of the Company could be sold at one sale for cash I would advise the stockholders to accept the amount of the capitalization of the Company, which is \$260,000."?

A. Yes.

Q. When did you advise or when would you advise them to do that?

A. I suppose when I wrote the letter.

Q. Well, you were talking about 1913 a paragraph ahead of it.

A. Well, I will tell you. There were a great many changes and sometimes we'd have money enough and other times we didn't have, and that water situation was getting very serious. If they put that tunnel through it, it would ruin the land. Very likely that had something to do with it.

The Member: Put the tunnel through, you say?

The Witness: What?

The Member: You say put the tunnel through?

The Witness: Yes. They were figuring on a tunnel a hundred feet below the surface of the lake, Stone & Webster and the Reclamation Service, and drain the lake a hundred feet.

Q. (By Mr. Murray) When was that, Mr. Bliss? Do you recall?

A. Well, they had been talking about it for years.

Q. When did they first start talking about it?

[143]

A. Oh, I guess back in about 1903 or 1904.

(Testimony of William S. Bliss.)

Q. Then there was always a danger that they might do it? A. Yes.

Q. And when did that danger disappear, if ever?

A. Well, I don't know that it has disappeared yet. However, they would start to interfere with the physical outlet. If they did that we were told by General Webb that they would get control of the riparian rights, and they had a dredge up there and wanted to dredge it out. They had put holes down to blast it out and the boys went out in fishing boats over the holes and prevented them from blasting it out, because if they changed that it would have given Stone & Webster and the Reclamation Service control of the lake, and the riparian rights. We had quite a fight up there. It come up one time and then died down for three or four years and then come up again. I don't remember exactly the years.

Q. That was always hanging over your head?

A. What is that?

Q. That possibility was always hanging over your head? A. Yes.

Q. Did it have any particular effect upon the value of the land? A. Sure it did.

Q. It depressed it, did it not? [144]

A. At times. And when we weren't talking much about it we learned we won out and the land looked better.

Q. What is your idea of the trend of values from 1900 on; generally speaking, the trend of values of the land in Douglas County on the Nevada side of Lake Tahoe?

(Testimony of William S. Bliss.)

A. Oh, I couldn't tell you that.

Q. Did it increase gradually in value or did it stand still or did it go back or what?

A. Oh, it has increased at times and went back, depending on depressions and a thousand and one things. I held my prices pretty well all the same.

Q. You held your prices even if there was a depression on, is that it?

A. Yes. And by the time I got up there to '23 when Allen examined it I had sold—the sales price was only 85 per cent of my listed price. And I think that is doing pretty well.

Q. Well, did you attempt to put a price on in 1913 so you would never have a profit on it?

A. No.

Q. When you got away up into 1920——

A. (Interposing) Talk about "profit", I don't know just what you mean by that, because we had had that land from the '70s.

Q. But, I mean, was it a disappointment to you when a piece [145] of this property was sold at more than what you thought it ought to bring in 1913?

A. Disappointment to me?

Q. Yes. A. If it sold for more?

Q. Yes.

A. Why should it be a disappointment?

Q. Well, my point is that it seems to me that you said that in 1923 it seemed like there was very little difference as to what had been paid out on the property over what you had appraised it at in 1913, that you had done a pretty good job.

A. Yes.

(Testimony of William S. Bliss.)

Q. Well then, my question is, To do a perfect job it would have sold for just in '13 what it sold for in '23?

A. I didn't expect to do a perfect job in '13 in the sales effort.

Mr. Helvern: I would like to correct the record. The statement was made in the testimony or by Government counsel to the effect that Mr. Bliss's appraisal was made in 1913.

The Member: It was made in 1912.

Mr. Helvern: The point was that the appraisal was made before the passage of the Revenue Act of 1913.

The Member: It was made some time in 1912.

Mr. Helvern: Yes. Some time prior to the passage of the Revenue Act. [146]

Mr. Murray: I am not attempting to change that. I understand that that is 1912.

Q. (By Mr. Murray) No. But the point I would like to make, Mr. Bliss, is this: Didn't it occur to you as anything unusual that as years went by and you did sell some of these parcels that you always sold it at a loss or at a stand-off? Doesn't that seem you might be high in the beginning?

Mr. Helvern: I object, your Honor. It is a conclusion. A. I never thought anything about it.

The Member: Overruled. The witness answered the question.

Mr. Helvern: Counsel made the statement that these sales were always made at a loss, which is not correct.

(Testimony of William S. Bliss.)

The Member: He said made at a loss or at a stand-off, as I understand the question.

Mr. Helvern: That is not in evidence, either. Substantial quantity of the sales were made at a profit. Some \$400,000 worth, as brought out by the evidence of Mr. Bliss.

The Member: All right. I will sustain the objection.

Q. (By Mr. Murray) The evidence shows, Mr. Bliss, that in 1913 the Petitioner company here sold 640 acres of land to a man by the name of Defert.

A. Yes.

Q. It is Section 25, 13 18.

A. I know where it is. [147]

Q. You know where the land is. What is the character of it?

A. Well, it runs up on State Line Peak or Monument Peak, I think, and it was nearly all rough mountainous land. There was a small acreage near the road going to Carson Valley, which was pretty fair. It had a little timber on it.

Q. A little timber on it?

A. On that part.

Q. Well, Section 25 never was cut over, was it?

A. I don't think it was.

Q. In fact it isn't cut over today?

A. I don't think so.

Q. Then it is virgin timber, isn't it?

A. Oh, not all of that. Maybe 40 acres.

Q. Your testimony is that only 40 acres is virgin timber?

(Testimony of William S. Bliss.)

A. I don't know. I know the situation there. The very lower edge has some timber on it.

Q. Assuming that it was in virgin timber, to some extent anyway, whereas the lands here in question that were sold to Whittell in 1938 were all cutover land as has been stipulated——

A. (Interposing) Not all cutover.

Q. Well, practically. Would you contend that that one section of land in virgin timber had no more value than the cutover lands?

A. It wasn't worth much of anything.

Q. That is your testimony? [148]

A. This cutover land ran down to the shore that we sold to Whittell.

Mr. Helvern: There is no evidence to show that practically all of the Whittell land was cutover as—

Mr. Murray: (Interposing) I beg your pardon. I answered the Petition which shows that it was all cutover land.

The Member: The witness has answered the question. There is nothing before me. Go ahead.

A. (Continuing) It wasn't all cutover.

Q. (By Mr. Murray) What would you say with respect to the Carson-Tahoe lands in 1915 as distinguished from 1912? I mean in comparison with 1912 generally?

A. Oh, Lord! I can't tell you now. It is a good many years ago.

Q. Do you admit that the land ever became more valuable than you thought it was in 1913?

A. Some of it did.

(Testimony of William S. Bliss.)

Q. Well, all of it did, didn't it?

A. I wouldn't say that.

Q. You wouldn't say that? A. No.

Q. What part of it did?

A. Well, I didn't take out any special part.

Q. Isn't there any classification of it that you would say [149] became more valuable since 1912?

A. You must remember that there were 44,000 acres there that I am passing judgment on.

Q. Well, I call your attention to Zephyr Cove.

A. Yes.

Q. Did that have any more value, in your opinion, in 1915 than it had in 1912?

A. I think it was the same value.

Q. When is it your testimony that it began to increase any in value?

A. I don't know that I testified to that.

Q. No, but I am asking you, though. You lived in or around there all the time, didn't you?

A. Yes, at Glenbrook.

Q. Well, wouldn't care to say when you thought such property as Zephyr Cove began to increase in value?

A. Oh, no. No more than any other forty acres of the 44,000.

Q. It is your testimony that Zephyr Cove isn't any better than the rest of the land there?

A. Sure! It is better than most of it. It is on the beach.

Q. Well then, do I take it that you don't care

(Testimony of William S. Bliss.)

to say when that Zephyr Cove began to get more valuable than it was in 1912?

A. No, I couldn't say that.

Q. I see. What was the condition of the roads past Zephyr [150] Cove and between Glenbrook and Nevada State line in 1912?

A. Nothing like they are now. They are fine roads now.

Q. When did they become fine roads?

A. Oh, seven or eight years ago, maybe.

Q. Somewhere in 1934 or '35? A. Yes.

Q. Before that what were they like?

A. Well, they were sand roads, gravel roads, ordinary roads.

Q. What were they like in 1912 and '13?

A. Horse-and-buggy roads.

Q. Well, in 1912 and 1913 what were they like?

A. That's what they were like, as I remember.

Q. As you remember. Now, I understood you to testify this morning that the Fulstone sales in 1920, '22, '23 and '24, that there was something unusual about those sales. What was unusual about them?

A. Well, I don't know about them being "unusual". That land was a good deal like that Detert land. It ran up on the peak.

Q. Was it in timber?

A. No. No timber that they could get off.

Q. I think some of the sales to Fulstone were on the lake. For instance——

(Testimony of William S. Bliss.)

A. (Interposing) Oh, yes. That's right. But I am talking about the land back of Glenbrook.

Q. I am talking about the sale. [151]

A. There were two or three sales to Fulstone.

Q. I will direct your attention to the sale of the place that was later called Skyland in 1923.

A. Oh, yes.

Q. Was there anything peculiar about that sale to Mr. Fulstone?

A. Fulstone was after me to sell it—no, he wasn't. He was talking about it. He had a little money, and the Company wanted to sell it and to get him to buy it. I said that I would agree to go in with him. The two of us were to buy it.

Q. Oh, I see.

A. Then we bought it and I had this trouble with Murphy and I turned my interest over to the Company, this Company.

Q. Your interest to Skyland?

A. The Skyland; and the Company and Fulstone sold it for \$18,000.

Q. Well, when did your trouble with the Company begin? I thought you said it was 1926 when that happened, in the Malley deal?

A. I guess it was.

Q. Well, this sale was in 1923, according to the evidence.

A. Well, it ran on. I turned it over in '26 when I began that suit.

Q. When it was first sold to Mr. Fulstone, then, you were in on it with him, is that it?

(Testimony of William S. Bliss.)

A. Yes. [152]

Q. And do you remember what was paid for the Skyland? A. No, I don't.

Q. It was \$9,000, wasn't it?

A. I don't know.

Q. Well, I got the impression that you said it was at very depressed prices or something like that.

A. I may have referred to some of the other Fulstone sales, I don't know.

Q. Oh, I see. With respect to that one the \$9,000 was probably a fair price for it, wasn't it, in 1923? A. No, I don't think it was.

Q. Well, you wouldn't have been acting for the Company and making a sale and taking an interest in it at something less than the value, would you?

A. No. But I wanted to make the sale and the Company wanted to make the sale, and so we made it and then we talked it over with Fulstone about turning it over to the Company.

Q. Did the Company know that you were in it at the time?

A. Oh, yes. I wrote them about it and told Murphy to talk to Fulstone and to tell Fulstone, if he would buy it, I would go in with him.

Q. Could you have sold it to anybody else for any more at that time?

A. I don't know about that time.

Q. Well, you don't think you could, do you? [153]

A. Well, shortly afterwards it sold for \$18,000.

Q. Very shortly? A. Yes.

Q. A few months, wasn't it?

(Testimony of William S. Bliss.)

A. Yes. In '26, I believe, when I had my racket.

Q. Oh, three years later?

A. I think so, because I remember turning it over to the Company when I began that suit.

Q. Were you a party to the sale of it to the boys' school, Captain Daly? I think he is the one who bought it?

A. No. Fulstone and the Company sold it.

Q. Fulstone and the Company. Mr. Bliss, what was the first development on Lake Tahoe? I mean, what section was developed first from the standpoint of recreation land?

A. Oh, they had hotels and parks up there away back in the '70s. Old Hank had them.

Q. Whereabouts? A. Over at Tallac.

Q. Tallac is on the California side, isn't it?

A. Yes, the road from Placerville to Virginia, when the Virginia Comstock was started, ran right by the edge of the lake or back of the lake, and they had resorts and affairs in there away back in the '60s.

Q. When did Tahoe City begin?

A. I guess that was in the '60s. [154]

Q. That is in the northwestern part of the lake, isn't it? A. Yes.

Q. Well, that was pretty well developed from 1913, wasn't it, that section in there around Tahoe City?

A. They had built the tavern and got the little narrow gauge road in.

Q. You had a railroad in there? A. Yes.

(Testimony of William S. Bliss.)

Q. Was there any other way for any large number of people to get into the lake at all at that time?

A. They came in by stage.

Q. Into where?

A. Glenbrook and Tahoe from Placerville. Old Hank Monk drove the stage from Carson to Glenbrook.

Q. If they came into Glenbrook by stage where did they have to come from?

A. Well, they came from Carson to Glenbrook.

Q. From Carson, Nevada? A. Yes.

Q. There was no way to get from Tahoe City around to Glenbrook in those days, was there?

A. From Truckee.

Q. I say there was no way to get around the lake?

A. Oh, yes. Steamer.

Q. On the lake. But what I am trying to bring out is, if I [155] understand it right, that there was no road from Tahoe City around Glenbrook to the north of the lake in those early days, was there?

A. I have forgotten when that Emerald Bay road was put in, but that was quite early.

Q. That is on the California side?

A. Oh, you mean Nevada?

Q. Yes.

A. The road ran from Glenbrook right to State Line, south end of the lake and down to Placerville.

Q. Yes. But there was no road around the north end of the lake until in the 1920s, was there?

A. I guess not. Oh, I know there wasn't.

Q. Well, is it your opinion that lands on the lake

(Testimony of William S. Bliss.)

front over near Tahoe City—I will withdraw that.

Would you say that any of the land here in question, the land that was sold to Whittell, could be compared in any favorable way at all with lands over near Tahoe City in 1913 from the standpoint of value for recreation purposes? A. Oh, no.

Q. No comparison?

A. No. In 1913 we were getting one hundred to two hundred dollars a front foot around Tahoe City.

Q. Yes. I see. Now, I would like to ask you something about a quiet title suit by the Carson-Tahoe Company in 1916 to try to [156] quiet title to a large amount of property. A. Yes.

Q. Do you remember that?

A. Yes. About 10,000 acres.

Q. That quiet title suit involved some of the land here in question in this case, did it not?

A. Yes, I am sure it did.

Q. What was the necessity for that and the reason for it?

A. Well, I had a land attorney named Austin, and we were sizing up the land and found that somebody had signed their initials and not their full name and then had turned it over with the full name, and so on, and we decided that the title wasn't quite good enough in that case. And so we started in and found that there were about 10,000 acres out of the 44,000 that should be quieted, and brought suit to quiet title. Little defects in the titles and so on.

(Testimony of William S. Bliss.)

Q. Well, do you recall about when that was?

A. I guess '16; somewhere around there.

Q. '16 to '19, wasn't it? Somewhere in there? So the title to some of this property that we are talking about here in this suit was really not cleared until that suit was culminated, is that right?

A. That is true. We had been paying taxes on it, though, right along.

Q. Now then, I would like to ask you about the difficulties [157] you had with the Company in 1926 and thereabouts. I understood you to say this morning that about that time the—well, I will first ask you, Who were the directors of the Company then besides yourself?

A. Well, there was, in the first place, when I first went in there, there was Taylor—I have forgotten his initials—he is the nephew of Mills; and H. M. Yerington and myself were the three directors. And then Taylor died and I think a man named Cannon took his place.

Q. That was away back, wasn't it? I mean, that was before 1913.

A. When do you want?

Q. I would really like to know who the directors were when you had the difficulty in 1926.

A. Oh, '26. Well, Ed Yerington—E. B. Yerington—and Frank Murphy.

Q. And yourself?

A. And myself.

Q. Do I understand that they wanted to sell the Company's lands or some of them?

A. Oh, wait a minute! Wait a minute! Ed Yerington died. It was Daugherty.

(Testimony of William S. Bliss.)

Q. That's Daugherty, Murphy and yourself——

A. (Interposing) Were the directors.

Q. By the way, you called it "trustees". Is that the same [158] as the "directors"?

A. We considered it the same, yes.

Q. Then, do I understand that they wanted to sell some lands of the Company and you thought that the price was too low? Is that it?

A. Yes.

Q. That is what the difficulty was about?

A. Yes.

Q. You spoke——

A. (Interposing) Murphy insisted on selling as well as myself. I was the only one to do any selling then in the beginning. Then he had this friend Malley and wanted to sell this land to him in Zephyr Cove, and I wouldn't sell it. So he and Daugherty put Murphy, the vice-president, in as a salesman too. Then, he sold some other land—not the Zephyr Cove land, land around Cave Rock—to Malley and I objected to it and brought suit and enjoined them.

Q. What was the result of that suit? As I understand it, the minutes you read this morning stated that at that time the minute was drawn it hadn't been culminated yet? A. No, it hadn't.

Q. Did the Court finally give a judgment in it?

A. No. Didn't pass on it at all. After we traded that stock for the land, why, it was dismissed.

Q. It resulted in your getting out, though, this suit? [159] A. Yes.

(Testimony of William S. Bliss.)

Q. Do you remember what offer was made for Zephyr Cove at that time?

A. No, I don't remember. But I had it down on the '13 list there.

Q. Well, were they trying to sell it for less than you had down on the '13 list?

A. Oh, yes. When I make the statement that it was for less, we had a lot of talk over it. There were other things concerned. I think there were water rights and different things mixed up in it.

Q. Mr. Bliss, I show you what purports to be the Federal Corporation Income Tax Return of Carson and Tahoe Lumber and Fluming Company for the year 1918 and ask if that is your signature on this Return? A. Yes, sir.

Mr. Murray: I offer this Return in evidence as Respondent's Exhibit.

Mr. Helvern: No objection.

The Member: It will be received in evidence as Exhibit I.

(The Income Tax Return so offered and received in evidence was marked "Respondent's Exhibit I", and made a part of this record.)

Q. (By Mr. Murray) I show you what purports to be the Federal Corporation Income Tax and Profit Tax Return for the [160] calendar year 1919 of the Carson and Tahoe Lumber and Fluming Company, and ask you if that is your signature attached on that Return. A. Yes, sir.

Mr. Murray: I offer this 1919 Federal Income Tax Return in evidence as Respondent's Exhibit.

(Testimony of William S. Bliss.)

Me. Helvern: No objection.

The Member: Accepted in evidence.

The Clerk: J.

(The Federal Income Tax Return so offered and received in evidence was marked "Respondent's Exhibit J" and made a part of this record.)

Mr. Murray: If your Honor please, may I have permission to withdraw all the income tax returns that are put in for purposes of photostating and substituting photostats from them?

The Member: Leave granted.

Mr. Murray: That is all.

Redirect Examination

Q. (By Mr. Helvern) Mr. Bliss, you have discussed the relative value of the lands of the Company at various times. In your testimony this morning you stated that in 1898 the land—all merchantable timber had been cut off? A. Yes.

Q. Was there any underbrush, or what was the nature of that [161] land after it had just been logged off in 1898?

A. Oh, there was brush, but it was pretty well stripped.

Q. Stripped. Not much underbrush?

A. Oh, I don't know. There is brush there, but in many places they have cut cord wood, and when they cut cord wood they took everything that is in sight.

Q. Mr. Bliss, what changes if any, had occurred in the nature of that land in the years that had inter-

(Testimony of William S. Bliss.)

vened between the years 1898 and 1912 when you made your appraisal, if any changes had occurred?

A. There was a wonderful growth of second growth. It came up as thick as your fingers all over the country.

Q. In your opinion, Mr. Bliss,—

A. (Interposing) And a good deal of second growth had been coming. Some of that second growth was 50 years old.

Q. 50 years old?

A. But just the last part of it, it was cutover. It was wonderful growth.

Q. Did that occur in the period from 1898 to 1912 particularly, or don't you remember?

A. Oh, yes.

Q. It occurred in that period?

A. Well, as they cut the timber off, second growth came up. Now, they had been cutting timber for quite a while.

Q. How long does it take just getting through cutting timber [162] from the land to reach that period? How many years, would you say, you as a timber man?

A. Ten, twelve years, I suppose.

Q. Ten or twelve years?

A. It would be 20 feet high, in groves.

Q. In your opinion was the land made more valuable by the growth of this second growth?

A. Oh, absolutely. They wouldn't touch it where it was stripped.

Q. They wouldn't touch it in 1898?

(Testimony of William S. Bliss.)

A. No one would think of touching it.

Q. You considered it much more valuable in 1912? A. Yes.

Q. Mr. Bliss, they introduced a letter addressed to you by the Federal Government in 1924 in which you were asked certain questions by the Federal Government. Has the Federal Government ever called upon you as to your opinion of lands in the vicinity of Lake Tahoe?

Mr. Murray: I object to that, if your Honor please, unless it applies to this case. If it applies to anything else it is incompetent, irrelevant and immaterial.

Mr. Helvern: Your Honor, it does apply to this case.

The Member: Overruled. He may answer.

Q. (By Mr. Helvern) All right. Did the Government ever ask your opinion about the valuation of lands? [163] A. What about '24?

Q. Well, what about '24? Did they ask your opinion in '24?

A. In '25 I went over it with Allen.

Q. You did?

A. I don't remember '24 much.

Q. Well, in '25 Allen was a revenue agent, was he? A. Yes.

Q. And you did go over it. And at his request?

A. Yes, absolutely.

Q. And you have a letter from the Government asking your opinion about these lands, have you not?

A. I think I have.

(Testimony of William S. Bliss.)

Q. Did the Government accept your opinion? You expressed an opinion, did you not?

Mr. Murray: If your Honor please, I must object to these questions as leading. He is testifying.

A. I don't know what letter you have reference to.

Q. (By Mr. Helvern) All right. Mr. Bliss, you have testified that the Government did ask your opinion with respect to valuations.

A. In talking over with Allen he asked my opinion and we went over the thing thoroughly. I think we were two weeks at it.

Q. Then, if the Government asked your opinion did they ever to your knowledge accept your opinion with respect to valua- [164] tion of timber lands in the vicinity of Lake Tahoe?

A. Yes, sure! They accepted it. It resulted in the report.

Mr. Murray: Objection to that.

The Member: I think it is proper. I will overrule the objection. It bolsters up his qualifications as an expert, not that it has anything to do with estopping the Government at all, but—

Mr. Helvern: (Interposing) This is solely with respect to the qualifications of Mr. Bliss to pass upon these values.

The Member: All right.

Q. (By Mr. Helvern) Then, with that in view the Government did obtain your opinion with respect to a valuation of another large piece of land in the vicinity of Lake Tahoe, did they not?

This touches upon the qualifications.

(Testimony of William S. Bliss.)

Mr. Murray: I object.

The Member: The thing is, counsel, it is so terribly leading. And I will have to sustain the objection on that ground.

Mr. Helvern: Yes.

Q. (By Mr. Helvern) In the case that I mentioned in which the Government did ask your opinion——

A. (Interposing) What?

Q. In the case in which you stated that the Government did [165] ask your opinion——

A. (Interposing) Yes.

Q. (Continuing) ——and you gave them your opinion, did you? A. Yes.

Q. Did they accept it or reject it?

Mr. Murray: If your Honor please, that was the question that was eliminated, your Honor please.

The Member: The question now is, Did they accept it or reject it?

Mr. Bliss, state whether or not at any time you made an appraisal for the Government of any other property?

The Witness: Except the lumber company's?

The Member: Yes.

The Witness: I may have, but I don't remember.

The Member: He doesn't remember.

Mr. Helvern: Well, if your Honor please, the direct question was asked of Mr. Bliss, and perhaps it was the way the question was put. Mr. Bliss was called upon by the Government in another case involving approximately the same amount of land.

(Testimony of William S. Bliss.)

Mr. Murray: If your Honor please, I object.

The Member: Well, the witness says he doesn't remember any such thing.

Mr. Helvern: May I ask one more question?

Q. (By Mr. Helvern) Mr. Bliss, did the Government ever reject, or did the Government ever accept your opinion with [166] respect to any valuations of lands in the vicinity of Lake Tahoe?

A. I remember they accepted it all.

Q. They accepted it all? A. Yes.

The Member: Do you remember ever making an appraisal for the Government for any land besides your own company land?

The Witness: I might have. The Tavern Company.

The Member: The Tavern Company?

The Witness: Yes. The Lake Tahoe Railroad & Transportation Company.

The Member: Do you remember anything about that transaction?

The Witness: No, I don't.

The Member: All right.

Q. (By Mr. Helvern) You made the statement "Your" Company land. Do you refer to Carson land or to Bliss Company land?

A. No, Carson-Tahoe.

Mr. Helvern: That is all.

The Member: That is all, Mr. Bliss. Thank you.

Witness Excused.

The Member: Call your next witness.

Mr. Helvern: I will call Mr. Comstock. [167]

MR. HARRY O. COMSTOCK

a witness called on behalf of Petitioner being first duly sworn, testified as follows:

The Clerk: State your full name, please.

The Witness: Harry O. Comstock.

Mr. Helvern: May I proceed, your Honor?

The Member: Yes, sir.

Direct Examination

Q. (By Mr. Helvern) Mr. Comstock, what is your age? A. Born in 1874.

Q. And where were you born?

A. Carson City, Nevada.

Q. And where have you lived most of your lifetime? A. Lake Tahoe.

Q. Do you live there now, Mr. Comstock?

A. Yes, sir.

Q. What is your business, Mr. Comstock?

A. Hotel.

Q. And what particular hotel are you owning now? A. The Hotel Brockway.

Q. That is where?

A. Located on the north end of Lake Tahoe.

Q. Mr. Comstock, what other hotels have you owned in the vicinity of Lake Tahoe? [168]

A. My father took a lease of the Lucky Baldwin

(Testimony of Harry O. Comstock.)

property at Tallac in 1880 and we operated that 36 years.

Q. Do you know Mr. W. S. Bliss?

A. Whom?

Q. Pardon me. First, Mr. Comstock, what is the location of Tallac?

A. Tallac is on the south end of the lake.

Q. On the south end of the lake?

A. That's right.

Q. Is that in California or in Nevada?

A. California.

Q. Close to the line, is it not?

A. About six miles.

Q. How long have you known Mr. W. S. Bliss?

A. Most of my life.

Q. You state that you are a hotel man. Did you ever own and sell any properties?

A. Yes. We have always——

Q. (Interposing) In the vicinity?

A. We have always dealt in real estate, because we operated in connection with our hotel, cattle business and lumber business.

Q. Was that your own property or for someone else?

A. No, our own property. And we also—with the Hotel Tallac there were 17 acres of land belonging to the Baldwin estate, or Baldwin at that time. It was under our control. [169]

Q. Mr. Comstock, I have here some notes which you have written in regards to your transactions of certain pieces of property. Will you recite and

(Testimony of Harry O. Comstock.)

tell in your own language what sales of land you made in the vicinity of Lake Tahoe and about where they were and at what price they were sold and when?

A. Well, I have a pencil memorandum of those and you have them there. If you want to ask me about them—— (Pause)

Q. These memoranda were made by you just before lunch?

A. I made them, right. But they were made on the back of a letter written by your office. I don't know whether you want to turn it in or not.

Mr. Murray: I don't object to the witness refreshing his recollection.

The Member: He may refresh his recollection.

Mr. Helvern: He spent considerable time in the Court room refreshing his memory and writing these down. I just want to refresh the witness's recollection.

The Member: All right.

Mr. Helvern: You have no objection?

Mr. Murray: No objection.

Q. (By Mr. Helvern) You may keep these.

A. May it please your Honor, this is a little bit at random. I have skipped around on this, but I will make it reading as I have it here, if it is O.K. with the Court. [170]

1913 was the last year that my partner and myself operated Tallac. We moved to the other end of the lake and gave up our lease, and we run our own dairy and killed our own beef and rented considerable land besides the land we owned. And

(Testimony of Harry O. Comstock.)

then after leaving Tallac this land was for sale. I sold J. T. Scott in 1918 eighteen hundred acres of land for \$19,000. Part of this land was meadow land and most of it was cutover timber land. I sold two——

Q. (Interposing) Now, Mr. Comstock, would you state about the location of this land?

A. Yes.

Q. In each case?

A. I can give you the location. This land was about seven miles back from Lake Tahoe, what is called the Little Truckee River, and some of it was over back of what is known as Meyers Station toward the mountains of Job's Peak and Freel Peak, and it used to be a sawmill called Woodburn Sawmill located on this land.

I next sold a few months later 685 acres to Barton and Keiber for \$10,000. This is located also on Little Truckee River, but about three miles nearer Lake Tahoe.

Mink Harbor located in Nevada just around the point from Brockway——

Q. (Interposing) Just a moment! Will you explain the general character of these lands as you go along? I think you will [171] save time if you do.

A. I will go back to the 685 acres?

Q. Yes, sir.

A. About half of that was meadow land and the other half was timber land and it had been cutover, but when we speak of "cutover land" in the early days they didn't go in as they go today and take

(Testimony of Harry O. Comstock.)

everything. They took only the choice timber. Lots of places where timber land had been cutover you wouldn't know it had been cutover if the stumps had not been pointed out to you.

I had an option from Will Bliss on 37 acres of land known as Mink Harbor in Nevada. This option was about 1910—let's see! Wait a mintue! This option was about 1915, and I didn't exercise.

Q. How many acres? A. 37 acres.

Q. 37 acres.

A. And this was rocky, water front land with a little bit of a harbor; very hilly, but nicely timbered.

Q. What was the option price?

A. \$7,500. I didn't exercise the option because I didn't have the money to do it with. I believed in it.

Q. What happened to that land? Do you know of your own knowledge?

A. Yes. It was sold a little later by Mr. Bliss to Mrs. Moore, and I am not sure about the price, but I think it [172] was about twice of what my option called for.

Mr. Murray: If your Honor please, I ask that that be stricken.

The Member: The latter part will go out. The other part is already in evidence.

Mr. Helvern: It is already in evidence but I am trying to qualify this witness as, among other things, a person able to judge the values of land.

The Member: All right.

(Testimony of Harry O. Comstock.)

Q. (By Mr. Helvern) Proceed.

A. Bought from Dave Park, located in Nevada, State line, two acres of land about 1910 for \$1,000. I sold it a few years later for \$3,000.

Q. A few years later? A. Yes.

Q. About when did you sell it?

A. I think about 1915.

Q. Yes, sir. What kind of land?

A. I beg your pardon?

Q. What was the nature of that land, Mr. Comstock?

A. That was beach frontage, 400 feet on the beach and 200 feet in depth.

Q. 400 for the front; yes, sir.

A. When we gave up our lease at Tallac we had a lot of property in there and Anita Baldwin bought from us over 200 [173] acres of land on the line between Tallac and on the west side of Fallen Leaf Lake, and the price was—some of it was \$15 an acre and some of it was \$20 an acre.

Q. What was the date that this land was sold, Mr. Comstock?

A. It was just average timber land with a little bit of meadow and aspens.

The Member: What is the date when it was sold?

Q. (By Mr. Helvern) The date, the year?

A. It was sold in 1913.

Q. 1913. And it was meadow land?

A. Very little meadow land; mostly timber; gentle rolling land. It was nice land, and what made it attractive was that it was part of it on the west

(Testimony of Harry O. Comstock.)

shore of Fallen Leaf Lake where Anita Baldwin eventually built a private home.

Q. Was it or was it not cutover timber land?

A. No, sir.

Q. Not cutover? A. Not cutover.

Q. Was that timber available for cutting, in your opinion?

A. Why, I don't know what you mean by that. It could be.

Q. Could it be lumbered off?

A. It could be lumbered off. The ground is accessible, but it has never been lumbered off. We wouldn't lumber it off and the Baldwin people wouldn't lumber it off.

Q. Why not? [174]

A. Because it is too beautiful as it is.

Q. And would it be feasible to lumber it off at a profit on that parcel?

A. Oh, yes. The land was quite level.

Q. I see.

A. In 1915 I sold 160 acres to W. W. Price, who operates Fallen Leaf Lodge up in the north end of Fallen Leaf Lake. This land did not touch Fallen Leaf Lake. It was back of the lake a little ways. There was some quite nice in timbers and a lot of it was quite rough and rocky, and we sold this for \$15,000.

Q. How many acres, Mr. Comstock?

A. 160.

Q. Rough and rocky land, I understood you to say?

(Testimony of Harry O. Comstock.)

A. Yes. And although it was nearer Fallen Leaf Lake we did not own lake frontage. It was owned by a man by the name of Swissel.

Q. No lake frontage?

A. No. It was back about two or three hundred feet from the lake. I am not sure of this date, but the approximate date was in 1917, I sold to A. L. Richardson what is now known as Richardson 195 acres of land, 295 feet of water front, for \$35,000.

Q. And what is the location of Richardson's Camp?

A. That was east of the Tallac property and what was then the [175] Tevis property, and is now the Pope property.

Q. And sold for \$135,000. And what was the nature of the land? A. Sold for \$35,000.

Q. Oh, pardon me. \$35,000. Correction.

A. I also sold further east of that along a strip of the beach, which was not particularly good land as it is subject to overflow in high water, about 1300 feet running from 150 to 200 feet in depth, to a Mr. Jameson for \$10,000.

Mr. Murray: What year did you say that was, please?

The Witness: That to Jameson was sold before I sold to Richardson. I think it was 1915. Let's see! That was 1914, sir.

Q. (By Mr. Helvern) Was that land subject to overflow?

A. It was a strip of beach land with marsh land

(Testimony of Harry O. Comstock.)

back of it and the lake in front of it and a little bit dangerous to build on, although there are nice homes on it today.

Do you want the rest of this?

I sold to Walter Heller right alongside of Richardson's 200 feet x 1500 feet in depth in 1914 for \$17,000.

Q. What was the nature of that land, Mr. Comstock?

A. Waterfront and a very fine beach.

Q. A fine beach?

A. Fine beach, fine timber; never been cut off.

Q. That didn't have any swamp land or overflow?

[176]

A. No.

Q. The next parcel, Mr. Comstock?

A. Now, to help you establish values, a Mr. Alvison, who was my father-in-law, bought the place I am now operating in 1900, Brockway; and the following year he bought 1100 acres from a man by the name of McKeown, who was in Alaska, for a dollar an acre plus the taxes that was against it, which made it cost him about four dollars an acre when he finished with it.

Q. This was in 1900? A. 1901 he bought it.

Q. And the location of Brockway is where?

A. At the extreme north end of the lake. And this property was west of Brockway property adjoining 400 acres owned by the Central Pacific Railroad, which my partner and I bought later. We bought this 400 acres from the railroad people in

(Testimony of Harry O. Comstock.)

'24 for \$40,000. But going on, this McKeown property——

Q. (Interposing) Mr. Comstock, did I understand that you sold that property?

The Member: No. Bought it.

A. Well, I interrupted by saying that there were 400 acres laying in between it and the Brockway property which my partner and I bought in 1924 for \$40,000.

Q. Oh, \$40,000?

A. \$40,000. Now, going back to the McKeown property, Mr. Alvison bought it in 1901 and he sold it to a firm in [177] Sacramento, and I am not—I can't remember the full name, but Breuner, the furniture man, was interested. And it was sold in 1910 or nineteen—or early 1911 for \$44,000.

Q. How many acres were sold for that price?

A. 1100.

Q. Sir? A. 1100.

The Member: 1100 acres.

Mr. Murray: What year, please?

The Witness: In 1910 or early 1911. That's all, excepting Brockway. We put in a subdivision there and sold off a lot of land and lots, which wouldn't be of any value to you gentlemen.

Mr. Murray: I am going to ask if the witness can go a little slower. I can't keep up with him, please.

The Witness: I am sorry. I would be glad to repeat anything.

(Testimony of Harry O. Comstock.)

Mr. Murray: I have lost out entirely on that 1100-acre sale.

The Witness: It was bought in 1901 for a dollar an acre plus the taxes against it. Do you want me to repeat it, sir?

The Member: It was sold in 1911 or 1912 for \$44,000.

The Witness: \$44,000. Correct.

Q. (By Mr. Helvern) Mr. Comstock, was that land accessible [178] by any road in 1912?

A. How is that, sir?

Q. Was that land that you just referred to accessible by any road?

A. Yes. There was a road from Truckee to Brockway, which was a very, very old road, an old wagon road; and that road had been in existence, oh, prior to 1900. I don't know how many years prior to that.

Q. Those were all the sales?

A. No. That road was in existence—I know of my own knowledge of its being in existence in 1894 or '95.

Q. Did that road proceed beyond Brockway?

A. No, sir.

Q. It did not. And those were all the sales that you were personally acquainted with?

A. How is that?

Q. Those were all the sales that you yourself consummated, is that true? A. The sales?

Q. Those are all of your sales, Mr. Comstock?

(Testimony of Harry O. Comstock.)

A. All of the sales of any large land holdings.

Q. Yes. Mr. Comstock, were you in making these sales yourself, and being there at the time familiar with the value of lands other than those which you yourself sold?

A. Well, you can see from this statement that my partner and [179] I were interested in lands, and if there were any lands for sale around Tahoe at any time we were always interested in it, and kept pretty well posted on real estate values.

Q. I believe you mentioned one sale to a man named Scott? A. Yes, sir.

Q. And that was in 1913. That was land at the south end of the lake?

A. Yes, sir; about seven miles from Lake Tahoe on the Little Truckee River.

Q. This sale of land to Mr. Scott, do you know of any other lands in that vicinity that I might compare the nature of that land with the nature of any other lands?

A. Well, there was a piece of land of about 600 acres laid between the property that I sold to Scott and the property that I sold to Keiber known as the Tim Barton place.

Q. Jim Barton place? A. Tim Barton.

Q. Yes, sir.

A. And I tried to buy it. I offered more for it than I sold my land for, and adjoining me on the west was a place called the Abe Jewell place which I offered ten dollars an acre for, and it was timber land and meadow land. And they refused my offer.

(Testimony of Harry O. Comstock.)

Q. When did you make this offer? In what year about?

A. Before we left Tallac; somewhere around 1912; 1910 or '12. [180]

Q. Yes. Mr. Comstock, you have been in Court this morning and you have heard the testimony of Mr. W. S. Bliss?

A. Yes, sir.

Q. And at the request of Mr. Bliss you have during the past two weeks reviewed the map showing the lands which Mr. Bliss appraised, and you have also reviewed, I believe, a copy of the appraisal made by Mr. Bliss of those lands, have you not?

A. Yes, sir.

Q. Mr. Comstock, I hand you a map designated "Exhibit No. 8". This is Petitioner's Exhibit No. 8 which was produced in testimony this morning. Have you previously examined a copy of that map?

A. Yes, sir.

Q. And what is indicated by that map?

A. This is the map of the land held by the Carson and Tahoe Lumber and Fluming Company at Tahoe.

Q. Yes. I hand you, Mr. Comstock, Petitioner's Exhibit No. 7, and contained in that Exhibit No. 7 is a sheet called "Exhibit A", and I ask you if you are familiar with that sheet of land and to describe it.

A. Well, I would have to refer to the map to get these numbers, but your Lots 4, 5, 6, 7, 8, 9, 10, 11 and 12 are the lots at Zephyr Cove in here.

(Testimony of Harry O. Comstock.)

Q. Yes sir.

A. And I am very familiar with them. Lots 1, 2 and 3, I pre- [181] sume, are north of Glenbrook. Is that correct?

Q. You will find them on the map.

A. That's right.

Q. You are familiar with 4, 5, 6, 7 and 8, are you?

A. Yes, sir.

Q. And what other blocks are you familiar with as to the nature of the land?

A. Well, this is on the south end (Indicating).

Q. South end?

A. Yes. You see, I leased a good deal of this land at the south end of the lake from the Carson and Tahoe Lumber and Fluming Company for a good many years to run cattle on. I leased nearly all of that land from them.

Q. And with that before you I would like to ask you a few questions about this. Do you recognize the figures shown on that Exhibit A in your hand in the minutes as being the values ascribed to that land by block number by Mr. W. S. Bliss?

A. Yes, sir.

Q. You do. And you recognize the black lines on that map as being the lines enclosing every one of these blocks?

A. That's right.

Q. You said you were familiar with the location of some of these lands. I will ask you if you are familiar with the land in Block No. 5 shown on that map. [182]

A. Yes, sir.

(Testimony of Harry O. Comstock.)

Q. Block No. 5 is indicated as having 2265 acres and Mr. Bliss ascribed a value of \$23,500 to that piece of land.

A. Well, how much water front has he got with that?

Q. No water front? A. None at all?

Q. No, none at all. \$23,500 was his estimate of that land as of April 7, 1912.

A. For how many acres?

Q. 2265 acres in that particular piece of land. What is your opinion on that appraised value?

A. Well, that land is land that is all suitable for home sites and it's rolling land that has been timbered over, but not heavily timbered. And I think that I can answer that question in a general way for you, with your permission.

Q. In your own words, Mr. Comstock.

A. I believe and have believed it and have bought land at Tahoe, that anywhere in Tahoe land that is not too rocky and has timber on is worth anywhere from six to ten dollars an acre. And I base my valuation on the wood and timber on it and the summer home possibilities. I have always—when I say “always” I am taking in a lot of territory—but I have always thought that there was a limited amount of shore line on Lake Tahoe and should be held at a fairly good value. And I proved my value by getting the price for [183] mine that I have stated.

The Member: Now, of course, I understand that this particular property had no shore line?

(Testimony of Harry O. Comstock.)

Mr. Helvern: No shore line.

The Witness: No shore line.

The Member: And you realized, Mr. Witness, that this question is asked concerning your opinion about an appraisal as of a certain date in 1912, not what it is worth now.

The Witness: I realize that. And I will answer that this way: There was a good road, as good roads go in those days, from Carson City to Glenbrook, from Glenbrook to Tallac and from Tallac to Placerville. It was the road that was traveled in early days in stages. It went from Placerville to Virginia City. It was a road that automobiles could travel. And when I state the values of land there thinking of those days I am thinking of correspondingly higher price in California than anywhere on Lake Tahoe, although the market was not quite ready to take it up at that time.

The Member: Well, I don't understand that. You say it probably had value but the market wasn't ready to take it up?

The Witness: I will qualify that by saying this to that: When I was a youngster there my playmates were Indians, and it had developed and gradually developed that the demand for land had increased, and you couldn't touch California land of the same character as that for a great deal [184] more money.

The Member: When you say "California" do you mean the land on the California side of the lake?

(Testimony of Harry O. Comstock.)

The Witness: That's right. The California side was developed first.

The Member: Oh, I see.

Q. (By Mr. Helvern) Was that on account of the accessibility of the California land and the non-accessibility of the Nevada land? Did that have something to do with your answer?

A. No, I don't think it was accessibility. It is like a sub-division starts in one part of town that is just as accessible as another part of town, but somebody hasn't opened it up.

Q. Yes. Now specifically with regard to this Block No. 5 containing 2265 acres which Mr. Bliss valued at slightly more than ten dollars per acre, taking it by and large do you think his valuation was too great or too small in your own opinion?

A. Well, it wasn't too great because I am going to give you my reason why, if I may.

Q. That is all right.

A. Because it is located very near Glenbrook resort, which also increases the value of land for home privileges and home building, and this land is nicely timbered and fairly level, sloping enough so that a building most anywhere on it would have a view of Tahoe. [185]

Q. Now, if we may pass to Block No. 1, which is shown on the map, and here was Mr. Bliss's appraisal, the value of Block No. 1, the first Block on there, showing the acreage and shore feet——

A. (Interposing) That has 8,250 feet of shore line and 550 acres of land.

(Testimony of Harry O. Comstock.)

Q. Yes, sir. Valued at \$27,500 by Mr. Bliss.

Mr. Murray: How many acres?

The Witness: 559 acres.

The Member: Valued at how much?

Mr. Helvern: Valued at \$27,500.

Q. (By Mr. Helvern) You can find that on the map, and if you are familiar with that particular piece of property, that land, tell me your opinion of that value, No. 1.

A. I know. I am just trying to locate exactly where it is myself.

Q. Do you know the name of this cove?

A. This one is Secret Harbor. I'm not sure. I think that is where the hotel property is located today. I am not sure about that. Glenbrook is away here. This is away north. Glenbrook is down here or down there (Indicating). Just a minute. No, he is further down. This is Secret Harbor.

The Member: How long has Glenbrook been a resort?

The Witness: Glenbrook was a sawmill, Judge, and a [186] big lumber mill. They had three mills there and a little town in until about 1898 when they abandoned the sawmills and tore down the mills, and I think the resort was started there in about 1906, '7, '8.

The Member: Sort of run as a combination ranch and resort?

The Witness: That is correct. And they have a lot of meadows in there.

The Member: Yes.

(Testimony of Harry O. Comstock.)

The Witness: A very lovely location.

Q. (By Mr. Helvern) Mr. Comstock, then you are familiar with that. What would be your estimate of the valuation ascribed to that land in view of your knowledge?

A. Are you asking me my estimate of that land today?

Q. No, in April, 1912 or March 1, 1913, approximately within six months of that date or eight months or nine months of that date.

A. I have never I have never valued any land at Lake Tahoe—and I say “never”—from the time I was active in business at less than ten dollars an acre, unless it was a straight up and down cliff, that was at all accessible. I valued it at a minimum of ten dollars up to a hundred dollars.

Q. As of what date?

A. I made these sales in 1914, 1915 from \$65 to \$85 a front foot. [187]

Q. Mr. Comstock, this land does not have much acreage but it has quite a shore frontage on the lake, and if you are familiar with that——

Mr. Murray: (Interposing) If you Honor please, I will have to ask here that there be no leading whatever, because the man is reading from the Exhibits in evidence.

The Witness: I don't want to see that. You want my opinion. You don't want Mr. Bliss's opinion.

Mr. Murray: That is right.

(Testimony of Harry O. Comstock.)

The Witness: I will be very glad to give it to you. I really don't care if I have that at all.

If I were going to appraise that land at that time I doubt very much if I would appraise that land as high as Mr. Bliss appraised it at that one particular piece, because it is not accessible to a beach. But when you came down to 4, 5, 6, down to 12, I would appraise it higher.

Q. Block 1 you would appraise at something less?

A. I would appraise it at less than ten dollars a front foot, and I would have taken the front footage for a depth of 300 feet for building purposes and then I would appraise the back land at five or six dollars an acre.

Q. And then you would have appraised that land very low. With respect to the shore frontage you would have appraised that at——

A. (Interposing) I would have appraised that land at about [188] \$12,000.

Q. At about \$12,000. There were 8000 feet of shore. A. All right. That's ten dollars.

Q. Per foot? A. Per foot.

Q. Are you sure of that? That would be \$80,000. Ten dollars X eight thousand is \$80,000. You don't mean that? A. I mean——

Mr. Murray: (Interposing) If your Honor please, the attorney is testifying here.

The Member: Well,——

Mr. Helvern: (Interposing) I am trying to correct the testimony of the witness, your Honor.

(Testimony of Harry O. Comstock.)

The Witness: I will go back and repeat what I said. I won't appraise any land on Lake Tahoe shore line that can be built on, that has a deeper depth to it, less than ten dollars a front foot.

The Member: That would be worth \$80,000.

The Witness: When I said Mr. Bliss, I didn't compute his figures. My mathematics are wrong, but my statement is right.

Q. (By Mr. Helvern) All right. We will pass to Block No. 2. I will say that for your information that that has 3300 feet of shore line and 2210 acres in Block No. 2 as delineated on that map. [189]

A. How much shore?

Q. 3300 feet of shore line.

A. Well, my appraisals of those shore lines you probably wouldn't accept.

Q. We want your opinion, Mr. Comstock, as of 1913.

A. I was selling land, I told you before, at that time at \$75, \$80 a front foot. And my contention is, as I said before, that anywhere on Lake Tahoe shore line where there is good building was worth \$10 a foot if it has reasonable depth.

Q. Yes, sir. Now, with respect to the acreage on that land, 2210 acres, what is your opinion of the average value per acre of that block?

A. Four or five dollars an acre.

Q. Yes, sir. About four or five dollars an acre. And the shore at about \$10 a front foot?

A. Yes, sir.

Q. The next block is Block No. 3. A. Yes.

(Testimony of Harry O. Comstock.)

Q. That has 3120 front feet of shore and 1343 acres of land.

A. Well now, let's see. That's shore there. Some of that shore is rather rocky, rather steep, and from the map here I wouldn't know. And if it is so rocky and steep that they couldn't build on it and get down to the beach, then it [190] wouldn't be worth that amount of money. But a great deal of land around there is quite accessible to the shore. [191]

Q. (By Mr. Helvern) Mr. Comstock, I hand you again Exhibit A, Mr. Bliss's appraisal. You have this map which you have studied previously and during this recess you have refreshed your mind. In your opinion generally throughout that entire appraisal what is your opinion of the total valuation that I refer to as of April, 1912? The total valuation Mr. Bliss stated was \$778,500, and I ask your opinion of that total valuation, considering all of the factors that you are familiar with in that land.

A. I not only today but in years gone by have talked with Mr. Bliss and have gone over his maps with him in regard to valuations, and I have always thought he was most conservative in his values that he placed on land. When I state that, I have been talking land with Mr. Bliss for the last 30 years. We helped lay out the road between Glenbrook and Brockway and I walked that with Mr. Bliss more than a half dozen times on foot. So at those times we discussed values, and it was natural for us to do

(Testimony of Harry O. Comstock.)

it whenever we were together. And I think that Mr. Bliss is always most conservative in his estimates of land values?

Q. May I ask if you think in this particular case he was conservative?

A. Which particular case?

Q. The case of this valuation of those 22 blocks that you have [192] on the map.

A. On the east side of the lake?

Q. Yes, principally on the east side of the lake and partly on the California side. You will note that the block numbers to 11, inclusive, are in the Nevada area and they go around the lake. You will note his values ascribed block by block. To save time I wonder if you could form an opinion as to this particular valuation of Mr. Bliss's?

A. Well, I am very familiar with that land there because we used to come by launch from Tallac to what is now Zephyr Cove on fishing trips and land in Zephyr Cove for luncheons. We did it for many, many years, and that shore line there I am quite familiar with. And, well, we always considered it a very beautiful building site.

The Member: The question is whether his appraisal in your opinion is conservative.

The Witness: Yes, I think it is very conservative.

The Member: And was it conservative as of the date mentioned, 1912?

The Witness: Yes. I think it is conservative on the date mentioned, 1912.

(Testimony of Harry O. Comstock.)

The Member: Any other questions?

A. (By Mr. Helvern) If you will refer on the map to Block No. 13, in the southern end of the lake in California, and tell me which one of the sales or any of the sales that you have mentioned of land comparable with those intervening lots [193] in Block 13, if any of your sales were that sort of land that you would say were comparable lands?

A. The sections of land and parts of sections that we sold were tied in and adjoining a lot of the land to the Lake Tahoe, Sierra Land & Water, whatever it is. It is the land and fluming, isn't it?

The Member: Carson and Tahoe Land and Fluming.

The Witness: There were two of them.

Q. (By Mr. Helvern) Yes, sir. They were adjacent.

A. And that land in there, around Section 20 and 40, 13, was tied in with land that we sold to Scott.

Q. Is that land that you are referring to as the Carson designated there as Block 13? Is that Block 13 that is referred to that you were discussing?

A. Yes.

Q. And to whom did you sell those lands? I know you have described the sales, but which particular sales of yours were sold out of land adjacent to these?

A. I know that we sold Scott land in Sections 20 and 21 and we sold to Keiber-Barton people in '16 and '17, which joins 13.

(Testimony of Harry O. Comstock.)

Mr. Helvern: All right. That is all, your Honor on direct examination.

The Member: All right, you may step down and you will be recalled for cross examination.

(Witness temporarily excused. [194])

The Member: As I understand it, by consent of counsel, counsel for Respondent is going to place on the stand a witness out of order in order to get—

Mr. Comstock: (Interposing) I might state that I drove from Brockway to get here away in the middle of the night. I want to get back tonight, if I can.

Mr. Helvern: I would like to ask counsel if he is going to complete with Mr. Comstock this afternoon.

The Member: If it is at all possible we will get back to Mr. Comstock.

As I understand it, by consent of counsel, counsel for Respondent is going to place on the stand a witness out of order in order to get the Captain back to the defense of the United States.

Mr. Murray: I will call Captain Weber.

MR. ARNOLD N. WEBER

a witness called on behalf of Respondent being first duly sworn, testified as follows:

The Clerk: State your full name, please.

The Witness: Arnold N. Weber.

The Clerk: W-e-b-e-r?

(Testimony of Arnold N. Weber.)

The Witness: W-e-b-e-r.

Direct Examination [195]

Q. (By Mr. Murray) Mr. Weber, what is your present occupation?

A. Captain Company B 115th Engineers.

Q. What was your position prior to—or, how long have you been a Captain in the Army this time?

A. March 3rd.

Q. March 3rd this year? A. Yes, sir.

Q. And what was your occupation prior to that time?

A. Associate forester, El Dorado National forest.

Q. And how long were you in that position?

A. Twelve years.

Q. That took you back to 1928, did it?

A. Yes.

Q. During that period of time what generally speaking were duties?

A. To handle the timber sales, purchase of private lands, either by exchange or direct purchase, and administrative duties in connection with forest administration.

Q. And during that period did you appraise lands in the vicinity of Lake Tahoe?

A. Yes, sir.

Q. Did your appraisals result in the purchase by the Forestry Service of the United States Government of private lands? A. Yes, sir. [196]

Q. Could you say off-hand how many sales to the Government were handled by your appraisals?

A. There were two.

(Testimony of Arnold N. Weber.)

Q. And when were the appraisals made on those two, please?

A. The first one was made in 1935. The second one was made in 1938.

Q. What did the 1935 appraisal and sale cover? What lands?

A. It included all of the lands owned by the Carson and Tahoe—

Mr. Helvern: (Interposing) May I have that question, please?

(The pending question was read by the reporter as above recorded.)

A. (Continuing) It covered the lands owned by the Carson and Tahoe Lumber and Fluming Company and the El Dorado Wood and Fluming Company in El Dorado National Forest.

Q. (By Mr. Murray) Then what were the lands involved in your appraisal which resulted in the purchase of lands by the Government in 1938?

A. That was the William Greuner land.

The Member: When you speak of the El Dorado National Forest, I don't know where that is, Captain.

The Witness: That is in the Counties of Amador, El Dorado, Placer of California, and Douglas of Nevada.

The Member: Right around— [197]

The Witness: (Interposing) Lake Tahoe.

The Member: Right around Lake Tahoe?

The Witness: Extending from Placerville eastwards, sir.

(Testimony of Arnold N. Weber.)

Q. (By Mr. Murray) This is Exhibit 15 in evidence which indicates that the Carson and Tahoe Lumber and Fluming Company sold lands to the Government in 1938. Is that the sale you are talking about?

A. The appraisal was made in '35 and the deal was consummated in '38.

Mr. Murray: Oh. If your Honor please, I have discussed these two maps with counsel for the Petitioner and asked if he would agree that these maps could go in evidence not for the purpose of proving any of the facts stated on there in themselves, but merely to show your Honor where the different lands involved are, both comparatives, and the land sold; with the understanding that any facts we hope to prove by it will be proved in some other way.

The Member: Any objection?

Mr. Helvern: No objection.

The Member: Accepted in evidence.

Mr. Murray: I would like to have the large small-scale map marked as a Government Exhibit and then the small large-scale map as another Exhibit, and eventually they will be taken off the board and rolled. [198]

The Member: Granted.

The Clerk: K and L.

(The maps so offered and received in evidence were marked "Respondent's Exhibits K and L," and made a part of this record.)

Q. (By Mr. Murray) Mr. Weber, I show you

(Testimony of Arnold N. Weber.)

Respondent's Exhibit K, which is a map covering all sides of Lake Tahoe, and ask you if you can recognize that as such and if you are familiar with the different locations shown by that map.

A. Yes, I am.

Q. Can you state what the location is of the property that was purchased from Carson and Tahoe in 1938, which followed the appraisal of that land in 1935?

A. Well, that was included in the Trout Creek and the Basin largely, and also extended over into Cold Creek. There were several scattered areas, one of them particularly that lay at the foot of the Meyers Grade on the Little Truckee River, and then one area over by Zilio's Mill, 440 acres.

Q. What direction from the lake is this particular land that you are speaking of located?

A. South of the lake.

Q. What is the character of that land of which you are speaking?

A. It varies from meadow land to very steep and abrupt land, the majority of it being rather medium in slope. [199]

Q. Is there much meadow land involved?

A. Very little. All the meadow land that is involved is that which lies around the Trout Creek drainage.

Q. Is there timber on the land?

A. Yes, second growth.

Q. And what is the state of advancement?

(Testimony of Arnold N. Weber.)

A. It is unmerchantable by reason of size. It wouldn't be merchantable for any milling process.

Q. Could you state how many acres of that land were purchased by the Government of this Petitioner Company in 1938?

A. Somewheres in the neighborhood of 7,790 acres.

Q. And can you state the price that the Government paid Carson and Tahoe Lumber and Fluming Company for this land in 1938?

A. Three dollars per acre.

Q. Three dollars an acre for the whole piece, the whole 7,700-odd acres? A. Correct.

Q. Now, is the land that you are speaking of included in the sections on that map, Respondent's Exhibit K, which are colored in red?

A. This is the land here. That's it. I didn't get that question.

Q. That's right. The land of which you are speaking is included in the section on this map, Respondent's Exhibit K, [200] which is colored in red?

A. Yes, sir.

Q. At the time when you were appraising this land about which we are talking did you enter into negotiations with some officer of Carson and Tahoe Lumber and Fluming Company?

A. I entered into negotiations.

Q. I say, did you enter into negotiations with some officer? A. That's right.

Q. Who is the officer? A. Mr. Murphy.

Q. What was your understanding of his capacity?

(Testimony of Arnold N. Weber.)

A. That he was general manager.

Q. Of what?

A. Of the Carson and Tahoe Lumber and Fluming Company, and also of the El Dorado Wood and Fluming.

Q. And was it through negotiations with Mr. Murphy that this land was purchased by the Government for three dollars an acre?

A. Yes, sir.

Q. At the time when you were negotiating with Mr. Murphy for the land of which you have spoken, did you discuss the possible purchase by the Government of any other land owned by Carson and Tahoe Company? A. Yes, sir.

Q. What was the location of that land, please? [201]

Mr. Helvern: I object to discussions as to other land that he purchased.

The Member: Overruled.

Q. (By Mr. Murray) What is the location from the lake of the other lands about which you talked with Mr. Murphy, at the time the other land was appraised for purchase?

A. The land owned by the Carson and Tahoe Lumber Company over in Nevada and Douglas County.

Q. Can you identify the land in green cross-hatching as the land about which you talked with Mr. Murphy, on this map, Respondent's Exhibit K?

A. Yes, sir.

(Testimony of Arnold N. Weber.)

Q. Did Mr. Murphy offer that land for sale or any part of it to the Government in 1935 to 1938?

O. Offered it all.

Q. Did he offer it all, including Zephyr Cove?

A. Excluding that portion of Zephyr Cove.

Q. Excluding Zephyr Cove, he offered you all the land he had over there? A. Yes.

Q. Offered the Government? A. Yes.

Q. The sale of that? A. Yes.

Q. Do you know what year that was when he made this offer? [202] A. 1935.

Q. Will you state what he offered all this land in green on the map, Respondent's Exhibit Q, for, exclusive of Zephyr Cove?

Mr. Helvern: I object, if your Honor please, upon the ground that the testimony is incompetent, irrelevant and immaterial.

The Member: Overruled.

A. The back land was offered for \$3.00 an acre and the shore land was offered for \$10.00 an acre.

Q. (By Mr. Murray) And that was——

The Member: (Interposing) \$10.00 an acre? The shore land was \$10.00 an acre or \$10.00 a front foot?

The Witness: \$10.00 an acre, sir, your Honor.

Q. (By Mr. Murray) And that included all the shore land in green on that map with the exception of Zephyr Cove? A. Correct.

Q. Did you compare that land that he so offered that is in green on Respondent's Exhibit K, the back

(Testimony of Arnold N. Weber.)

land, with the land which was eventually purchased by the Government south of the lake in 1938?

A. Yes, sir.

Q. What did you decide with respect to the comparison between the two lands?

A. We purchased the land in the El Dorado forest in pre- [203] ference to that over here because this was more desirable; that is, the land within the El Dorado was more desirable.

Q. And the land you purchased was in the El Dorado forest?

Mr. Helvern: Your Honor, may I ask the purpose of this comparison made by Mr. Weber?

The Member: You mean more desirable for what?

Mr. Helvern: More desirable for what purpose?

The Witness: More desirable for our purpose of timber production.

Mr. Helvern: For the purpose of the production of timber?

The Witness: Yes, sir.

Mr. Helvern: For any other purpose, or don't you qualify for judging that for any other purpose?

Q. (By Mr. Murray) What did you state the purpose was?

A. For the purposes of timber production, recreation, water supply.

Mr. Helvern: Solely for that purpose?

The Witness: All purposes, sir.

Mr. Helvern: All purposes of the Government?

The Witness: To which land is put.

(Testimony of Arnold N. Weber.)

Mr. Helvern: What is the nature of the purpose to which the land is put by the Government?

Mr. Murray: Don't you think this is cross examination that he is injecting in here now?

The Member: Yes, I think so. You can take those things [204] up on cross examination.

Q. (By Mr. Murray) Then, do I understand that you consider the land in El Dorado Forest, which is south of the lake, was better land for the purposes you stated than the land in green on the map at the east side of the lake? A. Yes, sir.

Mr. Murray: That is all.

Cross Examination

Q. (By Mr. Helvern) Mr. Weber, you I believe stated that you are an appraiser for the purpose of acquiring forest reserves for the Government, are you not?

A. No sir, I stated that I was an associate forester, and that part of my duties were to appraise lands for the Forest Service.

Q. What per cent of your time is put in in appraising lands for the Government?

A. Thirty to thirty-five per cent.

Q. How long did you hold that position?

A. Since 1928.

Q. And what did you do prior to that time?

A. I was on the Sierra National Forest outside Fresno for three years in training.

Q. In training. So that in those three years

(Testimony of Arnold N. Weber.)

you trained to become qualified to buy this land for the Government? [205] A. No, sir.

Q. What did you do in the three years?

A. I was trained over a period of fourteen years. Still am.

Q. You mean you are still in training?

A. Yes.

Q. But your training began about 1925?

A. '26.

Q. '26. Did you consider yourself competent to judge land prior to the period of your training, the beginning of your training period?

A. I wouldn't. I just got out of college.

Q. Yes. Your determination then of the value of lands has to do with valuation from 1925 up to the present time? That is, it could not go back of 1925, could it, or 1928 when you first went to work?

A. That's right, sir.

Q. For the Government. And the purpose of your appraisals was for Government purposes?

A. That's right, sir.

Q. For any other purpose? A. No, sir.

Q. You have stated that you appraised this land for the purposes of the Government. In making this appraisal did you give or were you required to give any consideration to the frontage of this land or any of it on Lake Tahoe? [206]

A. No. No frontage land was involved other than that which Mr. Murphy offered to the Government at \$10.00 an acre.

(Testimony of Arnold N. Weber.)

Q. Therefore you did not give consideration to water frontage in buying for the Government or appraising for the Government?

A. Oh, yes, yes; in other cases.

Q. In other cases?

A. Not in this particular case.

Q. Did you in this case give consideration to frontage on Lake Tahoe?

A. No, none other than what Mr. Murphy offered.

Q. I believe you stated that Mr. Murphy was the general manager of the Carson and Tahoe Lumber and Fluming Company at that time?

A. Yes, sir.

Q. Did you understand that he had authority to negotiate with you? A. Yes, sir.

Q. And in what year was this negotiation made?

A. 1935, during the month of October, November.

Q. 1935? A. Yes, sir.

Q. You had no evidence, did you, that Mr. Murphy was really the general manager at that time or had any authority to negotiate for sale? [207]

A. Oh, yes, sir.

Q. Do you know whether he had had any approval of the Board of Trustees of that company of any negotiations he might make?

A. I imagine he did because he signed the option to sell in my presence in Carson City.

Q. Did he show a resolution of the Board authorizing him to do that?

A. He did that eventually.

(Testimony of Arnold N. Weber.)

Q. Did he show any resolutions or authority authorizing him to make you a proposition as to the sale of other lands for which option was not given?

A. He had the authority and he assured me he did.

Q. He told you that he was the general manager in the year 1935? A. Yes, sir.

Mr. Helvern: That is all.

Mr. Murray: That is all.

The Member: That is all, sir.

Witness Excused.

The Member: Now, do you wish to recall Mr. Comstock to the stand for cross examination? I wish counsel would proceed as expeditiously as possible.

Mr. Murphy: Yes, I will.

The Member: Yes. [208]

MR. HARRY O. COMSTOCK

recalled as a witness on behalf of Petitioner, resumed the stand and further testified as follows:

Cross Examination

Q. (By Mr. Murray) Mr. Comstock, as I understood your testimony the only actual purchases and sales of property that you had anything to do with on Lake Tahoe were in California. That is right, isn't it?

(Testimony of Harry O. Comstock.)

A. No. I mentioned two acres of land land at Lakeside that I bought from Park.

Q. Two acres of land at Lakeside?

A. Yes. And I also mentioned an option that I had in Nevada on Mink Harbor.

Q. Yes. But you didn't exercise the option?

A. No.

Q. So you didn't buy or sell that? A. No.

Q. What did you do with the two acres you bought? A. Sold it later.

Q. When did you buy the two acres?

A. About 1910.

Q. And outside of that you never owned, bought or sold any land on the Nevada side of Lake Tahoe, is that right? A. No, that is not correct. [209]

I didn't mention that when I went to Brockway I bought 80 acres and 40 acres in Nevada and subdivided it.

Q. Where was that located?

A. That's where Cal-Neva and Cal-Vada and all those homes are located. I sold all that property.

Q. That adjoins California land, Cal-Neva?

A. That is in Nevada and joins the California line where Brockway today is located.

Q. Except for the two acres did you ever own, buy or sell any land in Douglas County, Nevada on Lake Tahoe? A. No.

Q. Well, where do you get your basis for saying that every foot of lake front on Lake Tahoe is worth at least ten dollars an acre no matter how far it goes back?

(Testimony of Harry O. Comstock.)

A. I base that on the California values of locations of land in Tahoe being very high and Nevada land being just as desirable. I have always made the statement that land on Tahoe is limited and must carry a high valuation for desirable water front.

Q. Then you just kind of figured that because the prices were high on the California side they ought to be worth something on the Nevada side, is that it?

A. That's right, sir.

Q. Why do you suppose none of it ever sold back in the early days on the Nevada side? [210]

A. Well, the people sort of gathered in communities, and as the subdivisions or communities were opened up they buy.

Q. Isn't it strange that none of those communities ever got started over in Nevada?

A. No, I don't think so. We went over into Nevada in 1914 when I began buying some land in Nevada.

Q. Where was that? A. At Brockway.

Q. Oh, at Brockway? Over the line from Brockway?

A. About 80 acres and 40 acres in Nevada.

Q. When did you buy that?

A. 1910 I bought the 40 acres and in 1916 I bought the 80 acres.

Q. What did you pay for them, do you remember?

A. Yes. The 80 acres I paid \$16,000 for and the 40 acres I bought prior to that and I paid \$5,000

(Testimony of Harry O. Comstock.)

for, and I paid \$14,000 for Brockway, sold at public auction on the Court House steps in Auburn in 1909.

Q. That's Brockway. That's in California?

A. Yes, sir.

Q. And how many acres were in Brockway?

A. 80.

Q. 80 acres?

A. 80 in Brockway and then 80 and 40 in Nevada, made a 200-acre holding there. [211]

Q. You spoke of a large tract of land that was sold sometime before '13 for a dollar an acre, didn't you?

A. It was bought for a dollar an acre by my father-in-law, step father, rather.

Q. For a dollar an acre?

A. I beg your pardon?

Q. For a dollar an acre?

A. For a dollar an acre plus the taxes.

Q. And when was it purchased?

A. About 1901 or '2.

Q. How many acres?

A. 1100, now known at Tahoe as the McKeown tract.

Q. I understood you to testify that they sold that 1100 acres for \$44,000, isn't that right?

A. Right, sir.

Q. That is \$44 for one, just about?

A. That's right.

Q. And what date was it when they accomplished that?

A. 1910 and '11. Late 1910 or early 1911.

(Testimony of Harry O. Comstock.)

Q. That showed the trend of advancement on the California side, didn't it? A. Yes.

Q. But you don't know and never did know of any sales of land at fancy prices on the Nevada side that you testified about a while ago around 1913, do you? [212]

A. Well, there was quite a little transaction where Bijou is located today.

Q. But that is in California, isn't it?

A. That is in California. And then in Nevada, at Lakeside, in Nevada, that was operated by a man by the name of Hill and they sold some property. I don't know how much and what it brought.

Q. Well now, as far as your testimony goes, the only sales that you have spoken about knowing anything about is in Nevada right next to the California line on both sides, isn't that right?

A. That's right.

Q. I think I understood you to say that you didn't believe accessibility had anything to do with it. Now, what do you mean? Had anything to do with the lack of sales on the Nevada side? Was that accessible to the public in 1913? A. Yes.

Q. By what route? By what method?

A. By a road from Carson City to Placerville and to Tallac.

Q. Did you ever come over the road in those early days?

A. Yes, sir. I drove the road when I was a babe-in-arms and have been going over it ever since. I have never missed a year at Tahoe.

(Testimony of Harry O. Comstock.)

Q. Well, it was a pretty tough road in the early days, wasn't it? [213]

A. No, sir; much better road than people thought it was. In the early days when we had the stage coaches every foot of it was sprinkled.

Q. Most people didn't think it was very good anyway?

A. Yes, that is relative. When they began to get automobiles and come in by automobile, any road was considered tough, although those who used the mountain road didn't think it was bad.

Q. You wouldn't say that people were as anxious to go over that road as they were to come up from Carson City to Brockway in the early days, would you?

A. Oh, yes. The road from Truckee to Tahoe City was no better than from Carson City to Tallac.

Q. How did the people come into Carson City in the early days? A. They came in by stage.

Q. They came in by a railroad, too, didn't they?

A. After 1898, didn't they?

Q. Well, around 1913 the railroad was doing most of the business in bringing people in and out, wasn't it?

A. The stage coaches went off after the railroad was put in.

Q. But you say in the year 1913 the railroad was the thing, wasn't it?

A. No. People came by automobile. [214]

Q. You wouldn't say that very many came by automobile in 1913, would you?

(Testimony of Harry O. Comstock.)

A. Yes, a great many.

Q. Anywhere near as many as came by train?

A. No. I think probably—of course, you are figuring back. Your memory may not be so good, but I would imagine 60 or 70 came by train and 40 by automobile.

Q. In 1913?

A. The first automobile I owned in Tahoe was 1907 and there were automobiles coming over there long before that. Speaking of this case, I hope that you will not hold me longer than noon tomorrow.

Q. Mr. Comstock, it is true, isn't it, that this valuation that you have attempted to put on the Nevada side of Lake Tahoe is based on just what you thought it ought to be in view of what happened in California? Isn't that right?

A. That is true.

Mr. Murray: That is all.

The Member: Any other questions on redirect?

Mr. Helvern: No questions.

The Member: That is all, Mr. Comstock.

Witness Excused.

Mr. Helvern: Mr. Bigelow. [215]

MR. S. C. BIGELOW

a witness called on behalf of Petitioner, was duly sworn, and testified as follows:

The Clerk: State your full name, please.

The Witness: S. C. Bigelow; B-i-g-e-l-o-w.

(Testimony of S. C. Bigelow.)

Direct Examination

Q. (By Mr. Helvern) Will you state your name, Mr. Bigelow? A. S. C. Bigelow.

Q. And are you presently connected with this Petitioner? A. I am.

Q. And what is your connection?

A. Secretary.

Q. How long have you been Secretary of Petitioner? How long have you been the Petitioner's Secretary? A. About 1924, as I recall.

Q. 1924. Mr. Bigelow, you listened to the testimony given by Captain Weber and, as I recall that testimony, he stated that it was his understanding that Mr. Murphy, a director of your company at the time you were secretary, in 1935, was the general manager of that company. Do you know whether or not that was true? A. That was not true.

Q. Did Mr. Murphy have any authority to negotiate for sales of land in 1935? [216]

A. Not to my knowledge. Those were matters that had to be placed before the Board of Trustees, and Mr. E. S. Daugherty was the president.

Q. Mr. Daugherty was what?

A. He was the president of the company and the trustee also.

Q. And Mr. Murphy did not have authority without the specific authority of the Board of Trustees to negotiate for any sales of land, is that true?

A. That is correct.

Q. Mr. Bigelow, you are as secretary, the custo-

(Testimony of S. C. Bigelow.)

dian of the documents of the company, are you not?

A. Yes, sir.

Q. And will you identify these two papers?

You will put it in as an Exhibit?

Mr. Murray: I hadn't intended to, but you may put it in.

Q. (By Mr. Helvern) Mr. Bigelow, this is what purports to be a corporation Income Tax Return of Carson and Tahoe Lumber and Fluming Company for the year 1937. Do you recognize those signatures? A. Yes, sir.

Q. That is the original Return?

A. Yes, sir.

Mr. Helvern: For the record I will put it in as Petitioner's Exhibit. [217]

Mr. Murray: May I ask permission to withdraw it and have copies made of all income or estate tax returns?

The Member: Leave granted.

The Clerk: 19.

(The Income Tax Return so offered and received in evidence was marked "Petitioner's Exhibit 19" and made a part of this record.)

Mr. Helvern: No objection.

Q. (By Mr. Helvern) Mr. Bigelow, do you find any reference in that Return to any sales of land by Petitioner in the year 1917? A. I do not.

Q. No land sales were reported in the year 1917?

A. I don't know of any.

Q. Does the valuation of any land appear in that

(Testimony of S. C. Bigelow.)

Return at any place? There is no balance sheet with the Return, is there?

A. There is no balance sheet. I don't see anything that reflects the value of land.

Q. Mr. Bigelow, I hand you a copy of what purports to be a Capital Stock Tax Return of Carson and Tahoe Lumber and Fluming Company for the year 1917. Do you remember seeing that in the company's files and did you bring that to San Francisco?

A. Yes. It is a part of the company files.

Q. Yes, sir. [218]

A. I brought it to San Francisco.

Q. In that company's copy of the Capital Stock Tax Return——

By the way, I will have this put in. You have no objection to putting this in evidence in the absence of the original Return?

Mr. Murray: No objection.

The Member: Accepted in evidence.

The Clerk: 20.

(The Capital Stock Tax Return so offered and received in evidence was marked "Petitioner's Exhibit 20" and made a part of this record.)

Mr. Murray: I would like permission to withdraw it.

The Member: Leave granted.

Mr. Murray: Oh, that is your Return.

Q. (By Mr. Helvern) Mr. Bigelow, is there any reference made in this Capital Stock Tax Re-

(Testimony of S. C. Bigelow.)

turn to any land valuations for the company or any valuations of property of whatever kind?

A. I see none.

Q. Yes. Attached to this return is a memorandum. In your opinion, is that a part of the original draft of that Return, that typewritten carbon copy of a typewritten memorandum?

A. I would say it was.

Q. You would say it was? A. Yes. [219]

Q. Would you read what appears on that carbon copy?

A. "To comply with the requirements of the United States Income Tax Law and the decisions relating thereto, enacted September 8, 1916, a corporation should change the book value of its property to comply with the law and decisions, by putting a new valuation and appraisement upon its property, as of March 1, 1913.

"By this is meant in fixing this value, the value should be made to be a fair value of the property as of the date of March 1, 1913.

"In the U. S. Income Tax Return of March 1, 1917, and each year thereafter, the gain or loss to be reckoned with in said return, is based upon whether the property, in the event of a sale, was sold for more or less than the value so fixed as of March 1, 1913."

Q. Mr. Bigelow, then in your opinion is that statement a part of the Capital Stock Tax Return?

A. I would say, Yes.

Q. Mr. Bigelow, in that statement attached to the Capital Stock Tax Return it is indicated that the

(Testimony of S. C. Bigelow.)

company would use that \$260,000 value of land in connection with its sales of property that you read. In the Income Tax Returns which you have prepared and which you are familiar with what value did the company use with respect to its sale of land from and after 1917? [220]

A. What values?

Q. At what basic values did they claim when they filed their returns?

A. Do I have the question right? You are speaking now of Income Tax or Capital Stock Tax?

Q. I am speaking of Income Tax Returns. In computing any profit or loss on sales of lands what basic value did they use for determining whether a profit or a loss was sustained?

A. The March 1, 1913 value; the difference between that and the selling price, less commissions and expenses.

Q. Did they ever use in their Income Tax Returns any value based on this \$260,000, to your knowledge? A. Not to my knowledge.

Q. Mr. Bigelow, you have stated that the company did not use the book value at any time to your knowledge in making returns. I have in my hand here a claim for refund, which is your file copy of a claim for refund filed for the year 1935. Do you recall any claim for refund filed in that year?

A. Yes, I do.

Q. And why was it necessary to file that claim?

A. In making up the Income Tax report I had used the book value in figuring the profit instead of

(Testimony of S. C. Bigelow.)

using the March 1, 1913 value, which resulted in an overpayment of tax and a claim was filed for refund. [221]

Q. For refund. Based upon this error, shall we say? A. That is correct.

Mr. Murray: I will ask that that be stricken out. This leading is just terrible! He says "Based upon an error".

The Member: Well, "If an error". I will strike out the question.

Mr. Helvern: I will put it another way.

Q. (By Mr. Helvern) Mr. Bigelow, you state a refund claim was filed with the Government and in that refund claim what was the basis that was claimed for this particular sale in 1935 in the refund claim?

A. We asked for a return of, I recall, around \$831.

Q. Is this a copy of the claim for refund, your own file copy? A. Yes, sir.

Q. And what was the basis for that claim, did you say? A. The basis for it?

Q. Yes.

A. I used the book values instead of the March 1, 1913 values in making up the—

Q. (Interposing) Yes, sir. Did the Government ever refund that money to you? A. Yes, sir.

Q. I hand you a photostatic copy of a certificate of over assessment by the Government. Did you

(Testimony of S. C. Bigelow.)

ever see the original [222] of the paper of which this is a photostat? A. Yes, sir.

Q. Where is the original?

A. It appears to be lost. I have made an endless search to locate it.

Q. But to your own knowledge do you know that that is the photostatic copy of the Government's certificate of over assessment? A. I do.

Q. And what connection has this certificate of over assessment with this claim for refund that you filed, or does it relate to this claim?

A. It does.

Q. It is for the exact amount of the claim?

A. It is for the exact amount of the claim, plus interest at \$113.12.

Mr. Helvern: I would like to submit this as Petitioner's Exhibit, with counsel's consent.

Mr. Murray: I object to it, if your Honor please, being incompetent, irrelevant and immaterial to this case. I don't know anything about the original of it, but it involves apparently a Treasury letter that has to do with some controversy they had. And I don't see any relevancy to this case whatsoever.

The Member: Overruled. I think it might be pertinent [223] to explain some matters that came out on cross examination.

Mr. Murray: All right. May I have an exception?

The Member: Yes. Admitted in evidence.

Mr. Helvern: May this go in as an Exhibit, your Honor?

(Testimony of S. C. Bigelow.)

The Member: It may be admitted in evidence.

The Clerk: 21.

(The certificate of over assessment so offered and received in evidence was marked "Petitioner's Exhibit 21" and made a part of the record.)

Q. (By Mr. Helvern) Mr. Bigelow, of your own knowledge the company received that money, did they? A. Yes, sir.

Q. In what year did they receive it?

May I have the Income Tax Return for 1938?

A. I would have to prove that by the record. It may have been 1938, I don't recall.

(The Income Tax Return referred to was passed to Mr. Helvern.)

Q. (By Mr. Helvern) Mr. Bigelow, this is the company's Income Tax Return for the year 1938, the original Return which was just handed to me by Government counsel, which we will put in as an Exhibit. If you will look at the reconciliation of surplus you will find the figure "831". Do you find a reference to a refund of taxes on that return?

The Member: If there is any in there it will speak for itself. [224]

Mr. Helvern: I will say for the record that it is in the reconciliation.

A. I didn't pick it out individually there. It might be in some other figure.

Mr. Helvern: I would like to submit this as Petitioner's Exhibit.

(Testimony of S. C. Bigelow.)

The Member: No objection? Do you want to withdraw them?

Mr. Murray: Yes, I wish to withdraw all these returns.

The Member: Leave granted.

The Clerk: 22.

(The Income Tax Return so offered and received in evidence was marked "Petitioner's Exhibit 22" and made a part of the record.)

Q. (By Mr. Helvern) Mr. Bigelow, you listened to the cross examination of Mr. W. S. Bliss. In 1912 or '13 or thereabouts it was brought out in the cross examination that certain lands of this company had been sold by the Sheriff at a tax sale to Mr. Bigelow. You are that Mr. Bigelow, are you?

A. Yes, sir.

Q. And is that true, that you were the purchaser of these lands?

A. Not for myself. I purchased them for the company.

Q. Tell us the circumstances of your purchase of these lands. [225]

A. Well, they were permitted to go delinquent, as I understand, to perfect title, and I simply bought them in at Sheriff's sale and reconveyed them to the company, paying the taxes, plus the penalties and interest, advertising.

Q. I believe that at the Sheriff's sale that land was bought in at a certain price per acre, was it not?

(Testimony of S. C. Bigelow.)

Anyhow, do you recall what price you bought the land in at? A. No, I do not know.

Q. Did you have any trouble buying the land?

A. No, sir. There were no other bidders. I simply offered the amount of the taxes and the accumulations, and so on, and I received the deed at that price.

Q. You did not buy it for your own account?

A. No, sir.

Q. For whose account, then?

A. The Carson and Tahoe Lumber and Fluming Company.

Q. At their specific request and direction?

A. Yes, sir.

Q. And that was for the purpose of quieting their title to these lands?

A. As I understood it, yes.

Q. The amount of money paid by you per acre for that land——

Mr. Murray: (Interposing) If your Honor please, I am going to ask that he not lead too much. It just amounts to testimony by counsel. [226]

Q. (By Mr. Helvern) How did you determine what amount per acre to pay for that land, Mr. Bigelow?

The Member: I will say he has already testified that was the amount of tax charges that were accrued?

Mr. Helvern: No further questions.

(Testimony of S. C. Bigelow.)

Cross Examination

Q. (By Mr. Murray) Mr. Bigelow, what office did Mr. Murphy hold in the Carson and Tahoe Lumber and Fluming Company in 1935?

A. Vice-president and trustee.

Q. Isn't it true that he represented the company in making contracts for sales of land of the company?

A. Well, he would probably discuss those matters with people that were interested and report to the Board of Trustees.

Q. Well, you were here this morning, were you not? A. Yes, sir.

Q. You heard Mr. Bliss say that in 1926 one of the reasons he got out of the company was that Mr. Murphy wanted to sell some of the land?

A. I did hear him say that.

Q. That is the truth, isn't it?

A. Well, there were differences between Mr. Bliss and Mr. Murphy. Of course, it was different at that time because Mr. Daugherty was not in the company. [227]

Q. When did Mr. Daugherty come in? 1926 is the year that I am speaking of. Was Mr. Daugherty in the company then?

A. I would have to look at the minute book. I couldn't tell you.

Q. Well, don't you remember that Mr. Bliss said it was Mr. Murphy and Mr. Daugherty that stood against him on that sale in '26?

(Testimony of S. C. Bigelow.)

A. I think he did; yes, sir.

Q. Well, don't you think that that is true, too?

A. I think so.

Q. So Mr. Daugherty was in from '26 on, at least until he died? I understand he is dead, isn't he?

A. From '26 to January of last year.

Q. Now, Mr. Murphy obviously locked horns with Mr. Bliss as to whether or not he could sell a piece of property to Mr. Malley, and Mr. Murphy won, didn't he, in that controversy?

A. With the assistance of Mr. Daugherty, because Mr. Daugherty or the majority of the trustees were agreeable with Mr. Murphy's ideas regarding it.

Q. Did Mr. Daugherty side with Mr. Murphy on that? A. Yes.

Q. And then would it be your testimony that Mr. Murphy didn't go on dickering with people selling the rest of the land?

A. I won't say that he didn't dicker, but I will say that [228] he didn't have the last say.

Q. Well, he was authorized to make negotiations with people for the purchase, was he not?

A. I think he did it on his own as a trustee. I don't know of any written authority that he had.

Q. Do you have the minute books of the company here? A. I think so.

Mr. Murray: Well, I won't take the time now if it will be understood that they will have the minute books here tomorrow for me to examine, if your Honor please. Will that be understood?

(Testimony of S. C. Bigelow.)

Mr. Helvern: Yes.

The Witness: Yes.

Q. (By Mr. Murray) Now, Mr. Bigelow, first I will ask you about this tax sale. I will show you what purports to be a Quit Claim Deed from the County Treasurer of Douglas County to you with respect to this tax sale that we are speaking of. Will you look at it and see if you can recognize that as being the deed?

A. I presume it is. May I ask at this point if in 1913 the County Seat was located in Genoa? I think it was. I made many trips to Genoa on a horse and buggy. Anyway, I am quite sure that that is the document.

Mr. Murray: Do you object to that?

Mr. Helvern: No. [229]

Mr. Murray: Then I offer in evidence as Respondent's Exhibit M a copy of a Quit Claim Deed from the Treasurer and Tax Receiver of Douglas County, Nevada to S. C. Bigelow, dated July 1, 1913.

The Member: Admitted in evidence.

(The Quit Claim Deed so offered and received in evidence was marked "Respondent's Exhibit M" and made a part of the record.)

Q. (By Mr. Murray) Now, Mr. Bigelow, this document now in evidence as Respondent's Exhibit M states that you were deeded a number of parcels of real property, which are set forth in here, on July 1, 1913 for \$26. Does that sound like the amount?

(Testimony of S. C. Bigelow.)

A. I don't remember. I couldn't tell you.

Q. Well, that's what the document shows?

A. All right.

Q. Now, calling your attention to that, I understood you to say that this was a public sale although you did not have any competition at the sale, is that right?

A. I made that statement because there was seldom a year that there wasn't some property in some of our corporations that a cloud may be located on the title and we permit it to go delinquent and effect the title and buy it in at Sheriff's sale. And I take it that that was the same thing.

Q. Well, for whatever reason this went to tax sale and was purchased by you in 1913 for \$26.00, the land described in [230] this document, is that right? And nobody showed up to bid any more on it?

A. Not to my recollection. I don't recall of anyone offering any competition at all.

Q. It was a public sale? There was notification given? A. Yes, sir.

Mr. Murray: I must confess that I have a duplication here. This Quit Claim Deed went in in certified form as Exhibit D. So I ask that is what now marked M may be expunged from the record and taken out.

The Member: Leave granted.

Mr. Murray: It is a duplication.

Q. (By Mr. Murray) Mr. Bigelow, we have had so many 3/1/13 values referred to here today

(Testimony of S. C. Bigelow.)

that when you refer to a 3/1/13 value I don't know which one you mean. Which 3/1/13 value did you mean when you were talking about this Capital Stock Tax Return?

A. Well, it is the book value set up in the records of the company. I can't quote the figures.

Q. Well now, on the Capital Stock Tax Return which is marked Petitioner's Exhibit No. 20, Capital Stock Tax Return for 1917, you show a value of your stock which reflects a value of your property as reported here at \$104,000. Now, did you have one value of this property for Capital Stock Tax purposes and another for Income Tax purposes? [231]

A. I would say that the capitalization there didn't reflect the true value of the property. I think that is arbitrary. That is my own opinion.

Q. I understood you to say that you had some 1917 sales of property, which I am sure Petitioner's Exhibit 15 bears out, and that it was your purpose to report those on your 1917 Income Tax Return.

Mr. Helvern: Mr. Bigelow was not secretary of the company and had no connection with it in 1917 until, I believe, 1925. Those are not his returns.

Isn't that so?

The Witness: That is correct. It is simply a company record. I had nothing to with the return.

Mr. Helvern: You have taken the custody of those records until 1925?

The Witness: Until about 1924.

(Testimony of S. C. Bigelow.)

Mr. Helvern: I just wanted to straighten that out for the record, if your Honor please.

Q. (By Mr. Murray) You were connected with the company before 1924, though, were you not, Mr. Bigelow? A. No, sir.

Q. Did you just come into the employ of the company?

A. I have been in the employ of the railroad since 1908.

Q. Oh. Then when you purchased this property at a tax sale in 1913 you weren't working for the company then? A. No, sir. [232]

Q. You weren't an officer of the company then?

A. Well, I was acting as ticket auditor for the railroad company at that time.

Q. I show you a letter to the Commissioner of Internal Revenue dated September 16, 1926 and ask if that is your signature attached to the end of it. A. Yes, sir.

Q. I will ask you to look it over and see if you remember.

A. (Examining letter) That letter was written by Mr. Murphy. I signed it.

Q. But you remember the letter? At least you have identified your signature on there?

A. I identify my signature, yes. The letter was written by Mr. Murphy.

Mr. Murray: I offer this letter in evidence as Respondent's Exhibit M, I believe it is now.

Mr. Helvern: No objection, if we may have this withdrawn for a copy.

(Testimony of S. C. Bigelow.)

Mr. Murray: I would like to ask at this time that privilege, too.

The Member: Admitted in evidence. Leave granted to withdraw and substitute copies.

(The letter so offered and received in evidence was marked "Respondent's Exhibit M" and made a part of this record.)

The Member: We will now recess until 10:00 o'clock [233] tomorrow morning.

(Whereupon, at 4:55 P. M. the hearing of the above entitled matter was adjourned to Thursday, June 26, 1941, at 10:00 A. M.) [234]

S. C. BIGELOW

a witness on behalf of Petitioner, having been previously duly sworn, testified further as follows:

Cross Examination (Continued)

Q. (By Mr. Murray) Mr. Bigelow, I will show you Respondent's Exhibit M which you identified as a letter you signed which is addressed to the Commissioner of Internal Revenue, dated September 16, 1926.

I will ask you what was the occasion for that letter? What was the purpose of it?

A. (Examining letter) I haven't read all of this letter.

Q. Well, will you read it, please?

(Testimony of S. C. Bigelow.)

A. Have you the letter that this makes reply to, this letter here of August 5, '26?

Q. I wouldn't have that because it was a letter to you. I may have a copy, but I am not certain.

A. Well, apparently it has to do with the payment of the capital stock tax. [238]

Q. I show you a copy of a letter of August 5, '26, which appears to be the copy of the letter you are answering, and ask you if you think it is?

A. (Examining letter) This has to do, of course, with the payment of the capital stock tax for the years 1922, '23, '24 and '25.

Q. Now, that appears to be the letter you were answering, doesn't it, a copy of the letter?

A. Yes, it does.

Mr. Murray: I offer this copy of a letter to the Petitioner company dated August 5, 1926, addressed to the company and signed by Deputy Commissioner R. M. Estes, Deputy Commissioner of Internal Revenue, which is the letter which called for the answer represented by Respondent's Exhibit M, and ask that it be introduced in evidence.

The Member: Received in evidence.

The Clerk: Exhibit N.

(The letter dated August 5, 1926, so offered and received in evidence, was marked Respondent's Exhibit N, and was made a part of this record.)

Q. (By Mr. Murray) Now, the letter that you hold in your hand, Respondent's Exhibit M, is an

(Testimony of S. C. Bigelow.)

answer to this letter, Respondent's Exhibit N, is that right? A. That is correct.

Q. Well, now, the letter which you were called upon to answer [239] says, in part: "It is noted that for the 1926 taxable period, the real estate held by your corporation has a fair value of \$260,000. However, from an examination of your returns filed for the preceding taxable periods, this item has a fair value ranging from \$38,713.00 to \$90,000.00. It therefore appears that the fair value of the real estate for the taxable periods ended June 30, 1919 to 1925, inclusive, might be understated. You will find enclosed forms for amended returns which should be complete in detail and forwarded direct to this office."

Now, I understod you to say yesterday that the capital stock tax returns that your company was filing about that time were just arbitrary figures. Is that still your testimony?

A. Well, I think, as I recall the situation, the amount of the valuation was permitted by law to be increased or decreased over a given period there.

Q. Of course, the law will speak for itself, but if I refresh your memory a little, isn't that since 1932 since that has been in effect?

A. That may be true.

Q. Obviously here they were telling you that maybe you understated it, and asking you if you didn't want to put the right price on; didn't they?

A. That is correct. [240]

(Testimony of S. C. Bigelow.)

Q. Now, in here you stated in answer to the letter which is Respondent's Exhibit N in evidence, "This company was originally organized in 1873 to conduct a wood and lumber business, but for the past 30 years or more that portion of its business has been discontinued and it is now but a liquidating company, the limited rentals and other incidental receipts not even paying taxes and operating expenses, and there has been but a limited demand to purchase the property of the company."

That is true, isn't it?

A. That is quite true.

Q. "The holdings are all on or in the neighborhood of Lake Tahoe; late last fall——" and I call your attention to the fact that this letter is dated September 16, 1926—that would be the fall of '25—I am quoting again "——late last fall and this spring a railroad was broad gauged to Tahoe and one of the largest resorts was taken over and enlargement and extensive improvements promised gave added value to the lands on the lake and particularly in that immediate vicinity"——.

It added some value to it at that time, did it not?

A. I think he states certain valuations there, if I am not mistaken, certain figures.

Q. I will go on quoting. "——but unfortunately the holdings of this company are largely on the opposite side of the lake, and while there has been augmented value it has not been so pronounced." [241]

(Testimony of S. C. Bigelow.)

Now, you meant that the influx or the broad-gauging of the railroad and all that benefitted mostly the California side, isn't that right?

A. Well, that was—as I tell you, Mr. Murphy wrote that letter. That was Mr. Murphy's idea of conditions at the lake at that time.

Q. Well, you signed this letter, though. That is your signature, isn't it?

A. (Examining document) That is my signature, yes, sir.

Q. Well, is there anything on the letter that indicates Mr. Murray wrote it?

A. Well, I know his language so very well and I have signed many letters he has written in various departments.

Mr. Bigelow, I show you what purports to be an original and amended capital stock tax return of Carson and Tahoe Lumber and Fluming Company for each of the years 1923, 1924 and 1925, which are the three years that were mentioned in the letter which is Respondent's Exhibit M in evidence; and ask you if you can identify your own name, your own signature and the signature of Mr. Bliss on each of these?

A. (Examining documents) Yes, sir, correct; that is my signature and Mr. Bliss'.

Q. That is Mr. Bliss' there (indicating)?

A. Yes, sir. Those returns were made up under the direction of Mr. Bliss and simply mailed to me at Carson City to [242] complete and file with the Collector of Internal Revenue.

(Testimony of S. C. Bigelow.)

Q. Yes. Which you did? A. Yes, sir.

Q. And you took his oath of signature there? You acknowledged his signature under oath?

A. That is correct.

Mr. Murray: I offer in evidence as Respondent's Exhibits the three sets of capital stock tax returns of the Petitioner, each set consisting of an original and amended return for each of the years '23, '24 and '25. They are together.

Now, the first exhibit is an original and amended capital stock tax return for the year '23.

Mr. Helvern: No objection.

The Member: Accepted in evidence.

(The amended and original capital stock tax returns for 1923 so offered and received in evidence, was marked Respondent's Exhibit O, and was made a part of this record.)

Mr. Murray: The next exhibit is an original and amended capital stock tax return for the year '24.

The Member: Accepted in evidence.

(The original and amended capital stock tax return for 1924 so offered and received in evidence, was marked Respondent's Exhibit P, and was made a part of this record.)

Mr. Murray: Next is an original and amended capital [243] stock tax return for the year '25.

(The original and amended capital stock tax return for 1925 so offered and received in evidence, was marked Respondent's Exhibit Q, and was made a part of this record.)

(Testimony of S. C. Bigelow.)

The Clerk: O, P, and Q. All admitted?

The Member: Yes, all admitted in evidence.

Q. (By Mr. Murray) When did you become Secretary of the Company, of this Petitioner company here, Mr. Bigelow?

A. About 1924, as I recall.

Q. Then, do you have knowledge of the Skyland transaction, the so-called Skyland transaction, which adjoins Zephyr Cove on the north, the Skyland territory?

A. I remember of the sale being made there, what was called the Skyland property, but I couldn't relate the detail of it.

Q. Could you locate it on a map, this Skyland property? I will show you a map which is marked Respondent's Exhibit L and ask you if these sections marked on this map in yellow constitute what is ordinarily called Skyland?

A. That is apparently the property, yes, sir, just north of Zephyr Cove.

Q. Yes. Well, now, when did—well, in the first place, the Petitioner company here sold that Skyland property, did it not?

A. It was sold, yes, sir.

Q. When was it sold, do you know? [244]

A. I have a record of it if I could refer to it.

Q. Yes, I would like you to. Which one would you like, your exhibit?

A. No; I have it over there in my brief case.

(Examining documents) November 1 of 1923.

(Testimony of S. C. Bigelow.)

Q. On November 1, 1923 Carson and Tahoe Company sold Skyland to whom?

A. Charles L. Fulstone.

Q. Your records do not show that anyone else was interested in the deal with him, do they?

A. No, sir.

Q. At that time anyway? A. No, sir.

Q. Well, did the taxpayer corporation here ever reacquire Skyland?

A. Reacquire the property?

Q. Yes, reacquire the property?

A. Not to my knowledge, no.

Q. Did they ever reacquire any interest in the property? A. I think not.

Q. Then, it was just sold and that was the end of it, in 1923, is that right?

A. It was conveyed by the company and never repossessed or reconveyed to the company, as I remember.

Q. Well, I show you the minutes of the taxpayer company [245] dated August 28, 1926 and I ask you if this is your signature on the minutes?

A. (Examining document) Yes, sir.

Q. And what is the other signature on those minutes? A. F. E. Murphy, Vice President.

Q. He was Vice President at that time?

A. That is right.

Q. And I will ask you if those minutes do not refer to some angle of this Skyland transaction?

A. Yes, they do.

(Testimony of S. C. Bigelow.)

Q. Well, I will ask you what they have to do with it? What was in controversy then?

A. It would appear that there was an agreement between Mr. W. S. Bliss, the then President of the Company, and Charles L. Fulstone.

Q. There was an agreement when?

A. (Examining document) This doesn't say, but I take it that it must have been about the time the land was sold in 1923.

Q. There was an agreement between Mr. Bliss and Mr. Fulstone with respect to the sale to Fulstone of Skyland for \$9,000; that is it, isn't it?

A. It had to do with that, no doubt.

Q. And it further shows that Mr. Bliss had an interest in that with Mr. Fulstone, doesn't it? [246]

A. Yes, sir.

Q. And these minutes show that in 1926 it had been called to the attention of the company and to Mr. Bliss that he at that time agreed to return to the company anything he got out of the deal; isn't that it?

A. That is substantially it, yes, sir.

Q. All right, that is all on that.

Where is Mr. Murphy now, Mr. Frank Murphy, the one we have been talking about here, who was Vice President in——

A. (Interposing) He has been dead for about a year and a half or more.

Q. And was he connected with the company up to the time of his death?

A. Yes, sir, he was.

(Testimony of S. C. Bigelow.)

Q. And what was his position at the time of his death? Was he still Vice President?

A. He was still Vice President.

Q. And he was Vice President of the company in 1935 when negotiations were being made for the sale to the Forestry Department of the lands that were discussed yesterday?

A. I am quite sure he was.

Q. Do you know how many shares of stock Mr. Frank Murphy owned in the taxpayer corporation?

A. He had about five voting shares, I think.

Q. And he held proxies for other shares, did he not? [247]

A. Sometimes the proxies ran to him and other times they would run to Mr. Daugherty, as I recall.

Q. Well, I show you a minute book of the taxpayer corporation covering the year 1936 and ask you if you can determine by that how many shares of stock in the company Mr. Frank Murphy held proxies for?

A. 219.3.

Q. Will you recompute that again?

A. 219.3.

Q. That was in the year 1936, wasn't it?

A. Yes, sir.

Mr. Murray: This will be the last point, if your Honor please, if you will bear with me a minute. This is a minute book that I have not seen before.

Q. (By Mr. Murray) I show you the minute book of the taxpayer corporation covering the year 1935 and ask you how many shares of stock Mr. Frank Murphy owned that year?

A. You mean how many he had by proxy?

(Testimony of S. C. Bigelow.)

Q. Well, by himself, in his own name first, how many? A. Five shares in his own name.

Q. Then, how many shares did he hold proxies for in 1935, or at this date anyway in 1935? The date is what? May 14, 1935?

A. That is right. 263.3 shares by proxy.

Q. That makes a total of 268 shares and three-tenths by his [248] own ownership and by proxy?

A. Correct.

Q. How many outstanding shares of stock were there in this taxpayer corporation during the year 1935?

A. Three hundred and fifty — let's see — 358 shares.

Q. Well, that is all that was voted there, but I guess they had more than that, didn't they? Wasn't it 520?

A. No; the 520—understand that of the 520 shares 162 shares had been returned by the Bliss family.

Q. That is right.

A. So there was a total of——

Q. (Interposing) A total of 348 outstanding shares of the corporation in 1935. Mr. Murphy on May 14, 1935 held proxies to 268—well, he owned 5 and held proxies to 263.3 more?

A. That is correct.

Q. And therefore he very obviously had a large control of the stock ownership in the voting power?

A. He did in the stockholders' meetings.

(Testimony of S. C. Bigelow.)

Mr. Murray: Yes.

The Member: Is that all the cross examination?

Mr. Murray: That is all.

The Member: Redirect?

Redirect Examination

Q. (By Mr. Halvern) Mr. Bigelow, regardless of ownership of [249] stock, is it true that any sale of land could only be negotiated by——

Mr. Murray: (Interposing) If your Honor please, I am going to ask there be no leading this morning, that he just ask him the question as to what happened and so on and so forth.

Q. (By Mr. Helvern) Mr. Bigelow, what authority was required to effect the sale of any parcel of land during the year 1935?

A. The permission of three trustees.

Q. Three trustees or two trustees?

A. Well, there was a meeting of three. Of course, the majority was two.

Q. You stated yesterday on cross examination that at the time in 1914 or '15 when you bought for the Petitioner some land at a tax sale that you were not employed by the company. Is that true, that your employment did not commence until 1936, I believe?

A. '24, that is correct.

Q. Just explain the nature of your employment, if any, which might have occurred at this time in 1915 or '14 when this land was purchased by you?

A. I am trying to think when Mr. Murphy became Vice President and General Manager of the

(Testimony of S. C. Bigelow.)

railroad, or Vice President in charge of the railroad because I was under his supervision in railroad service and at his direction I bought this land [250] in for this corporation.

Q. At the direction of Mr. Murphy you bought the land in? A. Yes, sir.

Q. You are familiar with the laws of Nevada and it is a matter of record—that when land is sold at a taxable sale is there any right of redemption?

A. Yes, the taxpayer has two years to redeem—

Mr. Murray: (Interposing) If your Honor please, I ask this be stricken. The law will speak for itself. This is a conclusion——

The Member: (Interposing) Yes, I think so.

Mr. Murray: I ask it be stricken.

The Member: That will go out. The Board will take judicial notice of the laws of the various states.

Q. (By Mr. Helvern) At the time you purchased this land, a deed has been introduced showing you took title, a quit-claim deed. For how long did you retain title to that land in your own name?

A. I would say just long enough to reconvey it to the company.

Mr. Helvern: That is all.

The Member: That is all, sir.

Witness excused.

The Member: Petitioner rests?

Mr. Helvern: Yes, Petitioner rests.

The Member: All right, call your first witness.

[251]

Mr. Murray: I will first call Mr. Hall, please.

JOSEPH W. HALL

a witness called on behalf of Respondent, was duly sworn and testified as follows:

The Member: State your full name, please.

The Witness: Joseph W. Hall, H-a-l-l.

Direct Examination

Q. (By Mr. Murray) Mr. Hall, what is your business?

A. I am in the real estate and insurance business.

Q. Located where? A. In Reno, Nevada.

Q. And how long have you been in the real estate business?

A. Well, since the year 1920.

Q. Are you generally familiar with the lands on the Nevada side of Lake Tahoe?

A. Yes, I have known about them since about 1901.

Q. You were up at the lake on the Nevada side in 1921? A. I was.

Q. How did you get up there?

A. I went up with a party camping and I think we went by horse team.

Q. How was the road at that time?

A. Oh, it was a fairly good country road.

Q. Which road did you come in on? [252]

A. We came by way of Glenbrook, Carson City and Glenbrook.

Q. Carson City and Glenbrook. How much time did you spend up at the lake in 1901?

(Testimony of Joseph W. Hall.)

A. I spent the summer until along about the first part of September.

Q. At that time did you have any interest in owning any property up there?

A. No, I did not.

Q. When did you go up again to the lake?

A. I don't recall, but I was up and down several times after that time.

Q. Well, did you actually purchase any land on the Nevada side of Lake Tahoe in the days around 1901 or thereabouts?

A. I bought 25.15 acres in 1903.

Q. I show you Respondent's Exhibit L in evidence and I ask you if you recognize that map which is one compiled by the Nevada State Highway Department as a map of the Nevada side of Lake Tahoe?

A. (Examining map) I do.

Q. Do you recognize on this map the property that you purchased in 1903?

A. Yes.

Q. Did you state the price? What was the price that you paid for this 25 and a fraction acres in 1903?

A. I paid about \$1.25, a dollar and a quarter an acre. [253]

Q. How much shore front was there on the lake?

A. About 2000 feet.

Q. About 2000 feet of shore front and you bought the whole thing for a dollar and a quarter an acre?

A. Right.

(Testimony of Joseph W. Hall.)

Q. And was some of it in the form of a beach?

A. Yes; a portion of it is a kind of a high rocky ridge and a large portion is a sandy beach.

Q. How many shore feet would you think there was of sandy beach?

A. About 500 feet, I should think, about that much.

Q. Now, this particular property that you purchased, is there any certain name for it that identifies it now? A. It is called Elks Point.

Q. Called Elks Point. And where is it with respect to Zephyr Cove?

A. It is about a mile and a half south of Zephyr Cove.

Q. And do you recognize the portion you purchased in 1903 for \$1.25 an acre?

A. It is here (indicating).

Q. Explain on the map what portion it is there.

A. It is marked red on the map, the blue dot.

Q. Well, we have so many colors on here. I think it is kind of a rust, isn't it, because we have a red up there (indicating). Isn't that a rust color with a green dot? [254]

A. Yes, it is.

Q. At any rate, on the margin of this map besides this square of color with the green dot there is the notation "Purchased by Joseph M. Hall in 1903, 25.15 acres at \$1.25 an acre."

A. That is right.

Q. That is right, is it? A. Right.

Q. Well, now, did you purchase any other land

(Testimony of Joseph W. Hall.)

about that time up on the Nevada side of Lake Tahoe, either yourself or in company with anyone else?

A. Yes, I purchased about 8.58 acres up on Skunk Harbor along with another friend of mine.

Q. About eight——

A. (Interposing) Eight and a half acres.

Q. In 1903?

A. That is right.

Q. Well, now, do you recognize that as the item on this map that you are looking at, Respondent's Exhibit L, as in red?

A. It is in bright red.

Q. Bright red. Well, now, did you purchase any other land on Lake Tahoe on the Nevada side at any time? A. No.

Q. This (indicating)?

A. No: I sold that as an agent. [255]

Q. Oh, I beg your pardon.

Now, did you hold this property that you did purchase; I mean, did you have it for sale at all times after you bought it?

A. No, sir; I just held it. I did give an undivided one-half interest in that 25 acres to friends of mine as a Christmas present.

Q. When did you do that?

A. Well, I think about '6, '7, or '8, after I had held it for two or three years.

Q. Well, would you have sold this property in there if you could have sold it at a profit in those early days? A. Well, I never intended to.

(Testimony of Joseph W. Hall.)

Q. Well, as a matter of fact, though, did you ever sell the property?

A. Yes, I sold part of it.

Q. What part did you sell?

A. I sold 23 acres.

Q. 23 out of the 25 and a fraction?

A. Yes, sir.

Q. And the two and a fraction acres you retained was that of the beach? Does that contain the good beach you were telling about?

A. Yes; we two owners sold it all except we retained an acre for each party on the beach. [256]

Q. And when did you sell that, Mr. Hall?

A. In 1925.

Q. And what did you sell that 23 and a fraction acres for? A. \$5,000.

Q. Now, you are speaking of the place known as Elks Point? A. Elks Point.

Q. Who did you sell it to?

A. I sold it to the Elks Tahoe Association.

Q. You sold that 23 acres at a ratio of about a hundred to one between 1903 and 1925; isn't that right? A. Oh, more than that.

Q. A little more than a hundred to one?

A. Yes, sir.

Q. You have been in the real estate business actively since 1920? A. Yes, sir.

Q. And you owned this property up there since 1903 and I understand you have been familiar with the lake more or less all that period; is that right?

A. That is right.

(Testimony of Joseph W. Hall.)

Q. When do you think the climb started in that value between 1903 and 1925?

A. I think activity showed itself along about 1922, '3 and '4. That was the beginning of it to any extent.

Q. Do you think that the main difference between that \$1.25 [257] an acre and the hundred and some dollars an acre you got actually started in about 1922?

A. It began to climb up slowly but there was not much appreciable activity until along about in the 1920s.

Q. Now, did you ever as a broker act in any other sales of land on the Nevada side of Lake Tahoe?

A. Yes, I sold some property on Skunk Harbor.

Q. Will you look on this map, Respondent's Exhibit L, and identify that land that you sold for someone?

A. It is the portion here in brown (indicating), checked off.

Q. In brown hatch? A. Brown hatch.

Q. Does it have some numbers and circles on it for lots?

A. Yes, lots 1, 2, 3, and 4 in the northeast quarter and the southeast quarter.

Q. Well, now, that location is correct on the map, is it? A. That is correct.

Q. Well, then, the markings I have on that, where I have Secret Harbor, that is a mistake?

A. That should be Skunk Harbor.

(Testimony of Joseph W. Hall.)

Mr. Murray: I am going to change that in pencil subject to check.

The Member: Yes.

Q. (By Mr. Murray) Now, for whom did you sell this property, Mr. Hall, that you have identified here on Skunk Harbor? [258]

A. I sold it for Lord Russell of England.

Q. And when did you sell it? A. In 1922.

Q. In 1922. How many acres were involved approximately? A. Approximately 290 acres.

Q. How much shore frontage?

A. It must be a full mile.

Q. And how much did you sell it for?

A. I sold that for \$5500.

Q. \$5500 for 290 acres?

A. 290 acres, about.

Q. Now, what was the character of the mile of shore?

A. It was a very fine harbor, sandy harbor in the southeast portion, and beyond that it was rather precipitous and rocky.

Q. Well, in the sandy harbor that you speak of is there also a beach?

A. There is a very fine beach.

Q. Very fine beach? A. Yes, sir.

Q. Well, do you know off-hand how much that figures an acre; I mean, I can figure it myself, 290 acres.

A. About a hundred and ninety. I should judge, 180 or 190.

(Testimony of Joseph W. Hall.)

Q. Anyhow, it was for \$5000?

A. No, \$5500. [259]

Q. It was how many acres? A. 290 acres.

Q. Did you ever get any inquiries about the Elks Point property asking you if you were interested in selling it, or was there anything said about it in between the dates of 1903 and, say, 1920?

A. No.

Q. Do you have any idea as to why you probably didn't get any inquiries about it?

Mr. Helvern: I object because that is a speculative question.

The Member: Yes; I don't think that is within the realm of expert knowledge.

Q. (By Mr. Murray) Well, to your knowledge was there any demand for property during the years 1913 to 1920 or so around Elk Harbor or Elk Point, this property you owned?

A. Not to my knowledge.

Q. When you first started going up to the lake around 1901 did you have any occasion to go over to the California side of the lake?

A. I went—I camped up there about 1912 at State Line Hotel, and we came up by way of Truckee and around by boat and landed at the pier.

Q. Where, please?

A. At Lakeside Park or State Line. [260]

Q. I see. Well, did you go over around Tahoe City at that time?

A. Oh, I guess we went through it.

(Testimony of Joseph W. Hall.)

Q. What was the development of that portion of the lake, the northwest portion of the lake in 1912?

A. Well, that was developing after the railroad was brought in.

Q. Do you know when the railroad was brought in?

A. I think about '2 or '3 but I am not positive.

Q. 1902 or '3? A. I think so.

Q. And that development was pretty much advanced in 1912, then, was it?

A. Fairly well advanced.

Mr. Murray: I think that is all.

The Member: Cross examine?

Mr. Helvern: No questions.

The Member: That is all, sir.

Witness Excused.

The Member: Call your next?

Mr. Murray: Mr. Boyle.

JOHN T. BOYLE

a witness on behalf of Respondent, was duly sworn and testified as follows:

The Clerk: State your full name, please. [261]

The Witness: John T. Boyle, B-o-y-l-e.

Direct Examination

Q. (By Mr. Murphy) Mr. Boyle, what is your occupation?

(Testimony of John T. Boyle.)

A. Oh, I am a clerk in the Trust Department of the Crocker First National Bank.

Q. Do you have in your hand there a document from the Trust Department of the Crocker First National Bank respect to the Estate of Elizabeth Beatty?

A. Not the Estate of Elizabeth Beatty, no.

Q. Will you tell me what it is, please?

A. Well, this is our file of an agency account that we had for Mrs. Elizabeth Beatty prior to her death and this file contains a memorandum of the sale of a piece of property in Lake Tahoe.

Q. Well, that is it.

A. It was sold prior to her death.

Q. Does it give a description of the property at Lake Tahoe that was sold?

A. Well, the description as shown in our records here is lots, 1, 2, 3 and 4, Township 14, Range 18, Douglas County, Nevada, 153 acres.

Q. And does your record show when that property you have just described was sold by the Elizabeth Beatty Estate?

A. Well, it was sold by Mrs. Beatty in her lifetime, not by her estate. [262]

Q. Oh, I beg your pardon.

A. It was sold on August 12, 1921.

Q. August 12, 1921. And does it show the price at which—

A. (Interposing) \$4000. She had a quarter interest in it by the way, but the total price was \$4000.

(Testimony of John T. Boyle.)

Q. Yes. Does your record show how many shore feet on the lake there were?

A. No; the only description we have is that which I have given you, just those lots.

Mr. Murray: That is all.

The Member: Any objections?

Mr. Helvern: No questions.

The Member: That is all, sir.

Witness Excused.

The Member: Call your next witness.

Mr. Murray: I will call Mr. Howell, please.

JAMES B. HOWELL

a witness on behalf of Respondent, was duly sworn and testified as follows:

The Clerk: State your full name, please.

The Witness: James B. Howell, H-o-w-e-l-l.

Direct Examination

Q. (By Mr. Murray) Mr. Howell, will you state what your occupation is? [263]

A. I am an industrial engineer and specialize in the management of properties. I handle all of Mr. George Whittell's properties in San Francisco and represent him also in his properties in Nevada.

Q. Mr. George Whittell was the purchaser of the land—I withdraw that, please.

I show you a map which is Respondent's Exhibit L in evidence, and ask you if you can locate the prop-

(Testimony of James B. Howell.)

erty on this map which was purchased by Mr. George Whittell from the Carson and Tahoe Lumber Company in 1938?

A. (Examining map) Subject to checking the map indicates that the property purchased by him is hatched in red.

Q. Were you present at the negotiations for the purchase by Mr. Whittell of this land that is hatched in red here on this map?

A. I carried on all negotiations connected with the purchase with the exception of the initial negotiation which was conducted by Mr. Larson. Mr. Larson saw Mr. Frank Murphy who was Vice President and Mr. Murphy said he would sell the property to Mr. Whittell at an agreed figure. I then conducted my negotiations with Mr. Norman McLeod, between Mr. Murphy and Mr. McLeod. Then, the entire transaction was handled through the Title Company.

Q. Well, did you understand that Mr. Murphy had authority to deal for this Carson and Tahoe Lumber Company? [264]

Mr. Helvern: I object. It is incompetent, irrelevant and immaterial.

The Member: Well, I will sustain the objection on that. If anything were said by any officer of the Petitioner company, but what this witness' understanding is is irrelevant.

Mr. Murray: Yes.

Q. (By Mr. Murray) Did Mr. Murphy indicate to you or say to you that he could sell this property to Mr. Whittell, this property here in question?

(Testimony of James B. Howell.)

Mr. Helvern: I object upon hearsay evidence.

The Member: Overruled.

Mr. Helvern: Leading.

The Member: I will sustain it as to the leading.

Q. (By Mr. Murray) Well, what transactions did you actually carry on with Mr. Murphy, you acting in behalf of Mr. Whittell, for this land that you have just identified on the map?

A. Mr. McLeod phoned Mr. Murphy and stated that he understood—I was in his office—he understood that Mr. Murphy had agreed to sell this land to Mr. Whittell for the agreed sum and Mr. Murphy said that it was correct and that he would come to San Francisco. I met Mr. Murphy in the Palace Hotel several days afterwards and the deal was concluded. It was a normal business transaction.

Q. Were any papers signed at that time?

A. My recollection is that we had a receipt for the original [265] deposit.

Q. And by whom was the receipt signed?

A. That I can't say. I think it was Mr. Murphy. I think the deposit was—I would have to refer to my records, your Honor, on that. We had so many purchases at the lake.

Q. Well, during the negotiations for the purchase by Mr. Whittell of this land in question were the relative values of the lands and the plats discussed in building up to the purchase price?

A. No, neither Mr. Murphy nor Mr. McLeod or myself discussed the relative values of any portion of the land purchased.

(Testimony of James B. Howell.)

Q. Did Mr. Whittell originally wish to buy all of this land here in question from Carson and Tahoe Lumber Company?

Mr. Helvern: I object on the grounds it is incompetent and irrelevant as to how much land he wished to buy.

The Member: If it is preliminary to some other question; I will overrule it at this time, however.

Mr. Murray: Yes.

A. Mr. Whittell desired to buy all the remaining holdings of the Carson and Tahoe Lumber and Fluming Company land in Nevada.

Q. (By Mr. Murray) Now, are you familiar with the land on the Nevada side of Lake Tahoe which is referred to as Skyland?

A. I am. [266]

Q. I show you a map which is Respondent's Exhibit L in evidence and ask you if you can locate the land known as Skyland and indicate it by a color on this map?

A. (Examining map) It seems to be indicated in yellow. May I refer to my maps, your Honor?

Mr. Murray: Yes.

The Member: Yes.

The Witness: It is indicated in yellow.

Q. (By Mr. Murray) On this map in evidence?

A. On this map.

Q. Who owns that land now?

A. Mr. George Whittell.

Q. When did he acquire it?

A. May I refer to my records?

(Testimony of James B. Howell.)

Q. Yes.

A. 1/21/38; January the 21st, 1938.

Q. January 21, 1938 Mr. Whittell bought Skyland that you have identified on the map?

A. Yes, sir.

Q. From whom did he purchase it?

A. Daly.

Q. A man by the name of Daly? A. Yes.

Q. How much did Mr. Whittell pay for Skyland?

A. \$60,000.00 [267]

Mr. Helvern: I object. This is incompetent, irrelevant and immaterial, 1938.

The Member: Overruled.

The Witness: Your Honor, I might explain—

The Member: I might say that I don't know what the exact probative value of a sale so far removed would have but I would consider it technically and legally relevant.

Go ahead.

Mr. Murray: If your Honor please, this is the same land that the taxpayer sold in '23 for \$9000.

The Member: All right.

Q. (By Mr. Murray) Mr. Whittell bought it for \$60,000, is that right? A. \$60,000.

Mr. Murray: That is all.

The Member: Any questions?

Mr. Helvern: No questions, your Honor.

The Member: That is all, Mr. Howell. Thank you.

Witness Excused.

The Member: Do you have a short witness, Mr. Murray?

Mr. Murray: Well, something along this line; I have three or four like that.

The Member: We will take a recess at this time.

Mr. Murray: All right.

(Whereupon a short recess was taken after which the [268] proceedings were resumed as follows:)

The Member: Call your next witness, Mr. Murray.

Mr. Murray: I will call Mrs. Allerman.

MRS. FRED ALLERMAN

a witness on behalf of Respondent, was duly sworn and testified as follows:

The Clerk: State your full name, please.

The Witness: Mrs. Fred Allerman, A-l-l-e-r-m-a-n.

Direct Examination.

Q. (By Mr. Murray) Mrs. Allerman, would you state for the record where you were born?

A. In Glenbrook, Nevada.

The Member: Where?

The Witness: Glenbrook, Nevada.

Q. (By Mr. Murray) Speak up as best you can, won't you? A. I will.

Q. That is on the east side of Lake Tahoe, is it not? A. Lake Tahoe, yes.

Q. And did you spend a number of years on the Nevada side of Lake Tahoe?

(Testimony of Mrs. Fred Allerman.)

A. Well, I was there all my life until I was married.

Q. You were there all your life until you were married? A. Yes, sir.

Q. When were you married, Mrs. Allerman? [269]

A. 1904.

Q. What was your name before you were married? A. Laura McFaul.

The Reporter: Spell it, please.

The Witness: M-c-F-a-u-l.

Q. (By Mr. Murray) Did you say you were married in 1904? A. Yes, I was.

Q. Then, where did you move when you were married?

A. Right where we are now, in Douglas County.

Q. Where is that, please?

A. Right below the Kingsbury grade.

Q. In Gardnerville, isn't it?

A. In Gardnerville.

Q. How far is that from Lake Tahoe, we will say, from Glenbrook?

A. Well, it is about 7 miles from Lake Tahoe.

Q. That is over the Kingsbury grade, you say?

A. Yes, sir.

Q. Then, you have spent the rest of your life there so far? A. Yes, sir.

Q. Where did you live most of the time that you lived at Lake Tahoe? A. On the Marley ranch.

The Reporter: Spell it, please.

The Witness: M-a-r-l-e-y. [270]

(Testimony of Mrs. Fred Allerman.)

Q. (By Mr. Murray) On the Marley ranch. Where is that located with respect to Zephyr Cove?

A. Well, it was south about a mile, about a mile south of Zephyr Cove.

Q. I will show you a map which is in evidence as Respondent's Exhibit L. This is a Nevada State Highway map which shows a section of the Nevada coast line of Lake Tahoe, and if I tell you that the place I am pointing to with my pencil is Zephyr Cove can you indicate for me on the map where the Marley ranch is?

A. Well, it is just about here (indicating).

Q. Was it on the lake front; I mean, did the ranch come out to the lake front?

A. Yes, it did.

Q. And what is the name, if any, of the bay that it was located on?

A. Well, Marlay Bay.

Q. Well, is that not called Marla Bay now, M-a-r-l-a?

A. Yes, Marla Bay.

Q. Now, who owned this ranch that you are speaking of on which you lived most of your time up at the lake?

A. Well, my father owned it.

Q. And is your father living now?

A. No, he is not.

Q. When did he die? [271]

A. In 1912.

Q. About how many acres were in the ranch that your father owned in the early days that you speak of?

A. There was 160, we always called it; 152, or something.

(Testimony of Mrs. Fred Allerman.)

Q. Well, was it 160 with the broken shore line?

A. 160, yes.

Q. Well, after you left home and went down to live at Gardnerville did you keep in touch with your father and mother up to the time of their death?

A. Oh, yes, sir.

Q. And did you see them quite often?

A. Oh, yes, I did.

Q. And do you know whether or not your father ever purchased any more land near or adjoining the Marley ranch? A. Yes, he did.

Q. Do you remember where it was located with respect to the Marley ranch?

A. Well, it was just south of our place.

Q. Did it adjoin it? A. Yes, sir.

Q. And did it have any fronting on Lake Tahoe?

A. Well, it had some, yes.

Q. And is there any special name that that property you say he purchased was known by ordinarily?

A. We always called it Round Mountain. [272]

Q. You always called it Round Mountain?

A. Yes, sir.

Q. Do you know how many acres were included in that parcel?

A. I don't exactly know the acres.

Q. Did it adjoin the Marley ranch on the north or the south? A. The south side.

Q. It adjoined it on the south?

A. Yes, sir.

Q. And do you recall when your father purchased that Round Mountain property?

(Testimony of Mrs. Fred Allerman.)

A. In 1911.

Q. Do you know who he purchased it from?

A. The Dangberg Company.

Q. The Dangberg Company of Minden?

A. Of Minden, yes.

Q. Minden, Nevada. Do you know what your father paid the Dangberg Company?

A. He paid \$200.

Q. He paid \$200 for the Round Mountain property? A. Yes, he did.

Q. What portion of Marla Bay on Lake Tahoe was taken up in shore line by your father's ranch and Round Mountain?

A. Well, it took up all the lake frontage.

Q. It took up all of Marla Bay? [273]

A. Yes.

Q. Where is Marla Bay with respect to Zephyr Cove?

A. Well, it is just between Round Top Mountain and Zephyr Cove.

Q. Well, no; Marla Bay with respect to Zephyr Cove, I say where is it? Is it north or south?

A. Well, it would be south.

Q. How near is it with respect to bays? Is it the next bay south? A. Yes, sir.

Q. Are you familiar with the property that is known as Zephyr Cove up there?

A. Oh, yes.

Q. You have been on it many times?

A. Oh, yes. [274]

(Testimony of Mrs. Fred Allerman.)

Q. (By Mr. Murray) Well, the place that your father owned, the Marley ranch, did that have a beach on it? A. Oh, yes.

Q. Was it a nice beach, in your opinion?

Mr. Helvern: Objection, your Honor.

The Member: Sustained.

Mr. Murray: That is all, if your Honor please.

The Member: Any cross examination?

Mr. Helvern: No questions.

The Member: That is all, Mrs. Allerman.

Witness Excused.

The Member: Call your next.

Mr. Murray: Mr. McFaul, please.

JOSEPH ALLEN McFAUL

a witness on behalf of Respondent, was duly sworn and testified as follows:

The Clerk: State your full name, please. [275]

The Witness: Joseph Allen McFaul.

The Reporter: Spell the last name, please.

The Witness: M-c-F-a-u-l; Joseph Allen, A-l-l-e-n, McFaul.

Direct Examination.

Q. (By Mr. Murray) Mr. McFaul, what is your present occupation?

A. Just working in the timber and working around, general work.

(Testimony of Joseph Allen McFaul.)

Q. Working in timber. What kind of timber work do you do?

A. Most any kind of timber work, cutting wood or logs.

Q. Do you cut wood out of the forests?

A. Well, no, it is not in the forest.

Q. Where is the wood that you cut?

A. Cutting—it is for Fred Allerman; it is on the west side.

Q. Well, you mean to say it is property owned by Fred Allerman? A. Yes, sir.

Mr. Helvern: I can't hear this witness.

The Member: Speak a little louder, Mr. McFaul, so counsel at the table can hear.

Q. (By Mr. Murray) How long have you been working in the wood business, as you call it?

A. Practically all my life.

Q. Where were you born, Mr. McFaul?

A. I was born at Zephyr Cove at Lake Tahoe.

[276]

Q. And how old were you when you left Zephyr Cove, do you know?

A. Well, I was only small when I left Zephyr Cove.

Q. Well, when you left Zephyr Cove wheer did you go to live?

A. We moved over to the old home ranch at Marla Bay.

Q. That is what you refer to as the home ranch?

A. Yes, sir.

Q. Who owned that ranch?

A. My father.

(Testimony of Joseph Allen McFaul.)

Q .How long did you live there?

A. Well, I stayed there practically until 1913.

Q. Were you old enough to work before 1913?

A. Yes, sir.

Q. And how were you occupied between 1910 and 1913, we will say?

A. We were working around there cutting wood for different parties.

Q. Well, when you say "Cutting wood," what do you mean, Mr. McFaul?

A. Well, it is just cutting four-foot wood.

Q. Cordwood? A. Cordwood.

Q. Is that the only kind of wood that you ever had experience in cutting? [277]

A. That was practically all.

Q. And was your father in the wood business?

A. He was.

Q. And you were associated with him?

A. Yes, sir.

Q. Did you leave the home place, as you call it, at Marla Bay in 1913? A. Yes, I did.

Q. Then, where did you go?

A. I came over into California, down to Merced Falls.

Q. For how long were you——

A. (Interposing) I went down there for seven years.

Q. Until 1920, about? A. About that.

Q. And then where did you go to live?

A. Then, I went from there into the Imperial Valley.

(Testimony of Joseph Allen McFaul.)

Q. Well, do you remember the condition of the roads near your home place, the location of your home place in 1913? A. Yes, I do.

Q. What were they like?

A. It was just ordinary roads, graveled roads, county roads; dirt roads, I should say.

Q. Do you remember the condition of the roads to and from Carson City and Minden to Lake Tahoe in those days? A. Yes, I do. [278]

Q. What kind of roads were they?

A. They were just dirt roads.

Q. Do you know whether or not many people came in and out of there during those days?

A. Well, there was quite a few; of course, nothing in comparison to now.

Q. How did they come in, those that came in those days?

A. Well, most of them came with horses and wagons. There was a few automobiles, but not many at that time.

Q. Did you ever hear of Zephyr Cove being offered for sale in the early days?

Mr. Helvern: I object to hearsay evidence, your Honor.

The Member: Objection sustained.

Mr. Murray: That is all.

Mr. Helvern: No questions.

The Member: That is all, Mr. McFaul.

Witness Excused.

Mr. Murray: I will call Mr. Jepsen.

HANS R. JEPSEN

a witness on behalf of Respondent, was duly sworn and testified as follows:

The Clerk: State your full name, please.

The Witness: Hans R. Jepsen, J-e-p-s-e-n.

Direct Examination [279]

Q. (By Mr. Murray) Mr. Jepsen, what is your occupation?

A. County Clerk and Treasurer, Douglas County, Nevada.

Q. And how long have you been the County Clerk and Treasurer of Douglas County, Nevada?

A. Nineteen years.

Q. As such you have custody of all the court records in that county, do you?

A. I have.

Q. Do you have with you the original Probate file in the Estate of Duane Leroy Bliss, deceased?

A. I have.

Q. Will you produce it, please?

A. (Witness produces file.)

Q. Will you show me the inventory and appraisal of real property from that file?

Mr. Helvern: I would like to see what this document is.

Mr. Murray: All right. Here is a certified copy.

Mr. Helvern: (Examining document) Your Honor, this appears to be an inventory and appraisal of the Estate of Duane Leroy Bliss. I object to the introduction of this in evidence as incompe-

(Testimony of Hans R. Jepsen.)

tent, irrelevant and immaterial, as not germane to the present issue and as not being competent in any respect to prove the values we are here trying to establish for these lands.

Mr. Murray: I haven't even offered it yet, if your [280] Honor please.

The Member: I assume that this inventory and appraisement will contain some land up near Tahoe?

Mr. Murray: It contains Zephyr Cove. It was testified to by Mr. Bliss himself yesterday.

The Member: Objection overruled.

Mr. Helvern: Might I make this one statement?

The Member: Yes, sir.

Mr. Helvern: The values stated in this are based upon the appraiser, I believe, or some political appointee of the State of Nevada and as such I object to this evidence as having no bearing upon the present case, as not being expert evidence of any sort. The person who made that appraisal is, I believe, now dead, in any event cannot be questioned as to his ability or knowledge of the land.

The Member: Objection overruled.

Mr. Murray: Well, if your Honor please, I have a certified copy of this document which was introduced—I mean, which was marked for identification yesterday as Respondent's Exhibit A. Therefore, I ask that it be received in evidence as Respondent's Exhibit A.

The Member: I assume the objection is the same to that?

(Testimony of Hans R. Jepsen.)

Mr. Helvern: Same objection. It does not appear to be the opinion of an expert. [281]

The Member: The same ruling will be made. It will be admitted in evidence.

The Clerk: Marked as Exhibit A in evidence.

(The inventory and appraisement so offered and received in evidence were marked Respondent's Exhibit A, and were made a part of this record.)

Q. (By Mr. Murray) Do you have with you the probate file of the Estate of Elizabeth T. Bliss, deceased, Mr. Jepsen?

A. Yes, I have.

Q. Will you produce the inventory and appraisement in the Estate of Elizabeth T. Bliss, deceased?

A. (Witness produces file.)

Mr. Helvern: Your Honor, I offer the same objection to this.

The Member: The same ruling. I take it that this is the same matter concerning which Mr. Bliss was cross examined yesterday.

Mr. Murray: Well, not with respect to Mr. Bliss' mother, Elizabeth T. Bliss. I only went some distance with him on the estate of his father.

The Member: The same property, is it not?

Mr. Murray: Yes, the same property.

The Member: Objection overruled.

Mr. Murray: Well, I therefore offer in evidence the [282] document which was marked for identification as Respondent's Exhibit G.

(Testimony of Hans R. Jepsen.)

Mr. Helvern: Same objection on the same grounds.

The Member: The same ruling.

(The inventory and appraisement so offered and received in evidence were marked Respondent's Exhibit G and were made a part of this record.)

Mr. Murray: The document I offered, by the way, is a certified copy of the inventory and appraisement in the Estate of Elizabeth T. Bliss, deceased.

Q. (By Mr. Murray) Now, I show you this inventory and appraisement of the Estate of Elizabeth T. Bliss, deceased, Mr. Jepsen, and ask if your name appears on that anywhere, other than as clerk, of course?

A. (Examining document) Yes, it does.

Q. Did you serve in some capacity in connection with that inventory and appraisement?

A. I served as an appraiser.

Q. And was this appraisal of this real property made by you?

A. Made on the 26th day of October, 1921.

Mr. Murray: That is all, if your Honor, please.

The Member: Any cross examination?

Mr. Murray: I beg your pardon, sir. That is all on that document.

The Member: You have other questions? [283]

Mr. Murray: I probably have another question or two to ask him, yes.

(Testimony of Hans R. Jepsen.)

Q. (By Mr. Murray) When you acted as an appraiser in the Estate of Elizabeth T. Bliss and placed the valuation that you have placed on the different properties described therein, what value did you consider you were placing on there?

A. We placed a value as it appeared as of that date.

Q. The value as of the date of the appraisal?

A. As of the date the appraisal was made.

The Member: You are county clerk of what county, Mr. Jepsen?

The Witness: Douglas County.

The Member: What is the county seat?

The Witness: Minden.

Mr. Murray: That is all.

The Member: Cross examine.

Cross Examination

Q. (By Mr. Helvern) Mr. Jepsen, how old are you? A. 41.

Q. And I understood you to say that for 19 years you have been in your present office?

A. That is right.

Q. What did you do prior to nineteen years ago?

A. Nineteen years ago would be approximately 1923, would it not? I worked for the Forest Service. [284]

Q. The Forest Service?

A. Prior to that time, yes.

Q. And you were the appraiser who appraised this Estate of Elizabeth T. Bliss?

(Testimony of Hans R. Jepsen.)

A. One of them, yes.

Q. And that happened in October 1921?

A. Yes, sir.

Q. You stated that you had appraised this at its value at date. What kind of value—will you further describe the value you were thinking in terms of when you made that statement?

A. Well, the value that lands were being at that time sold for at Lake Tahoe.

Q. Were you familiar with the value at which lands were being sold at that time in the vicinity of Lake Tahoe?

A. Yes, I believe I was.

Q. How did you obtain your familiarity with that?

A. Well, being connected with the Forest Service I had values of land—

Mr. Murray: (Interposing) Speak a little louder, please.

The Witness: I said having previously been connected with the Forest Service I had some idea of values of land.

Q. (By Mr. Helvern) In your connection with the Forest Service did you buy land for the Government? [285]

A. I did not.

Q. Well, how did your connection with the Forest Service acquaint you with the selling prices of lands or the asking prices of lands in that vicinity?

A. Well, nothing other than knowing the values of lands for grazing purposes and timber purposes.

(Testimony of Hans R. Jepsen.)

Q. How did you determine the value for grazing purposes?

A. Well, I handled the collection of grazing fees for the Forest Service for the three years that I was with them.

Q. Grazing rental fees. You knew what they were collecting for rentals? A. Yes, sir.

Q. Do you have any knowledge of the value at which lands were being sold, these grazing lands or other lands in that vicinity?

A. Well, nothing definite, no.

Q. No actual knowledge, then, of any actual sales that were consummated; is that true?

A. Well, I know I was not interested in any sales.

Mr. Helvern: On the evidence of this witness I again move that his appraisalment and his testimony be stricken from the record as being irrelevant and not having any value in this case.

Mr. Murray: If your Honor please——

The Member: (Interposing) Overruled. [286]

That is all, sir. You may step down, Mr. Jepsen.

Witness excused.

The Member: Call your next.

Mr. Murray: Mr. Park, please.

WILLIAM D. PARK

a witness on behalf of Respondent, was duly sworn and testified as follows:

The Clerk: State your full name, please.

The Witness: William D. Park, P-a-r-k.

Direct Examination

Q. (By Mr. Murray) What is your occupation, Mr. Park?

A. Sheriff and Assessor of Douglas County, Nevada.

Q. Sheriff and Assessor. How long have you been Assessor in Douglas County, Nevada?

A. Since January 1, 1923.

Q. And as Assessor you have custody of all the assessment rolls of Douglas County, do you?

A. I have.

Q. Do you have with you the assessment rolls of Douglas County for the years 1912 and '13?

A. I have.

Q. Will you turn to the page of the assessment roll which contains the assessment of the property in Douglas County owned by Carson and Tahoe Lumber and Fluming Company? [287]

A. For 1912?

Q. For 1912? A. Yes, sir.

Q. Is that the document you have before you?

A. It is.

Q. Will you state how many acres of land in Douglas County Carson and Tahoe Lumber and Fluming Company were assessed for in the year 1912? A. There was 15,471.

(Testimony of William D. Park.)

Q. (Mr. Murray indicates on document).

A. Yes, 1,886.

The Member: What is that? 15,000 and 1,800?

The Witness: Yes, 15,471 and 1,886.

Q. (By Mr. Murray) The Carson and Tahoe Company was not assessed for any other lands in Douglas County?

A. Not according to this record.

Q. I ask you what was the assessment rate on the acreage that you have just described?

A. \$1.25.

Q. One dollar and a quarter what?

A. An acre.

Q. Is there any segregation shown as between one grade of land and another?

A. None at all.

Q. All assessed at \$1.25 an acre? [288]

A. Yes, sir.

Q. As the same kind of land? A. Yes, sir.

Q. Do you happen to know from looking at those descriptions where in Douglas County this land is located generally? A. I do.

Q. Where.

A. It is on the Nevada side of the lake or east side of the lake.

Q. I will show you a map which is Respondent's Exhibit K in evidence and ask if you can read this map.

A. (Examining map) I can.

Q. I will ask you if you can show generally in the colors that are blocked out on the east side of

(Testimony of William D. Park.)

Lake Tahoe in Nevada what land is embraced in the land that was assessed to the Carson and Tahoe Company in 1912?

A. It is that in green.

Q. Well, in the green——

A. (Interposing) And the black.

Q. The black hatch? A. Yes, sir.

Q. Then, all the land indicated in green and in black, heavy black hatch, is the land that was assessed to Carson and Tahoe? A. Yes, sir.

[289]

Q. It was all assessed at the same rate of \$1.25 an acre? A. Yes, sir.

Q. Now, does this page of this assessment roll indicate anything else with respect to the Carson and Tahoe Company in 1912?

A. Well, it shows there were 613 acres that was delinquent and sold for taxes, sold at a delinquent sale January 20, 1913, to S. C. Bigelow for \$26.00.

Mr. Murray: Now, I have a copy of that page which was made by the Clerk, Mr. Jepsen, who was on the stand, and subject to your comparison I wonder if you would permit me to put that into evidence rather than putting the assessment roll in?

Mr. Helvern: Yes, no objection to that.

The Member: Accepted in evidence.

Mr. Murray: Well, this document was marked for identification as Respondent's Exhibit C yesterday. I now offer it in evidence.

The Member: Accepted in evidence.

(Testimony of William D. Park.)

The Clerk: Exhibit C.

(The page of assessment roll, so offered and received in evidence, was marked Respondent's Exhibit C, and was made a part of this record.)

Q. (By Mr. Murray) Now, Mr. Park, I understood you to say you became Assessor of Douglas County in what year? [290] A. 1923.

Q. And did you know the general character of the land on the east side of Lake Tahoe in 1923?

A. Well, I just became acquainted with it in 1923.

Q. You just became acquainted? You didn't know anything about it before that?

A. No, I did not. I did not pay any attention to it before. I had been up there lots of times but never paid any particular attention to that land.

Q. Well, when you became assessor how was that land being assessed at that time with respect to gradation or classification?

A. Well, it was assessed at—some at grazing land and some at pasture land and some at—mostly mountain land, though.

Q. Mostly mountain land? A. Yes, sir.

Q. When you first came in do you recall how much the mountain land was being assessed for in that locality?

A. Yes; I think it was \$1.25 an acre.

Q. Do you recall what the grazing land was being assessed for then?

(Testimony of William D. Park.)

A. There was three different classes. There was grazing first class at \$8.00, second class at \$5.00 and third class at \$3.00.

Q. The second at \$5.00 and the third at——

A. (Interposing) \$3.00. [291]

Q. And the mountain lands \$1.25 an acre?

A. Yes, and some at \$2.00.

Q. That was in 1923? A. Yes, sir.

Q. Now, when was the first time that you—well, did you at some subsequent date make further classification of this land? A. Yes, I did.

Q. About when did you do that?

A. Well, right in '23. It started to—land started to go up along about '23 and every year after that it raised and raised.

Q. I see, but until '23 neither you nor your predecessor had classified it any way but as you have said and at those rates? A. That is right.

Mr. Helvern: If your Honor please, it has not been introduced in evidence as to what his predecessor did excepting for the year 1912.

Do you wish to show what the predecessor did in the intervening years from 1912 to '23? That has not been shown.

Mr. Murray: Well, I will ask Mr. Park what the situation was with respect to classifications when he came in. I think that is in evidence.

The Member: I think he has already testified that [292] the classified mountain land was \$1.25 or \$2.00 and grazing land at \$8.00, \$5.00 and \$3.00, depending upon the grade.

(Testimony of William D. Park.)

Mr. Murray: Yes.

Q. (By Mr. Murray) I will ask him now: Was there any division for lake front at all at that time? A. No, none at all, no.

Q. Well, when was the first time that you started to assign a special value to lake front property?

A. I think in 1927 or '8, somewhere along there.

Q. Will you state the reasons why you did it at that time?

A. Well, the land along the lake shore became more valuable and it was selling at pretty good prices.

Q. At what time?

A. Well, I think it might have been as early as '26 and from then on until up to '30, '31 or '32.

Mr. Murray: That is all, Mr. Park.

The Member: Cross examine.

Mr. Helvern: Just a moment.

Cross Examination

Q. (By Mr. Helvern) Mr. Park, you stated that in 1912, and you looked at the record and indicated that no distinction was made between the different kinds of land assessed against Carson and Tahoe. Have you the records here for the subsequent years? A. No, I have not. [293]

Q. You have not? A. No.

Q. Do you know when any distinction or any change from \$1.25 per acre occurred in the assessment rolls? A. No, I do not.

(Testimony of William D. Park.)

Q. You did not acquaint yourself with those records? A. No.

Q. And you do not know? A. No.

Q. In 1923 certain changes had occurred; is that so? A. They did.

Q. And your immediate predecessor, the records show that he had made certain changes, or did you make those changes?

A. Well, I don't know whether he had or not, but I did in '23.

Q. Just the year before 1923 you don't know your predecessor——

A. (Interposing) Well, yes, I know there were some changes made but I don't know just what they were.

Q. Well, tell me, Mr. Park, when you first became assessor, how did you proceed to assess all this land? Did you pay any attention to what your predecessor had done, your immediate predecessor had done with respect to any of this acreage, or did you proceed upon your own to determine that?

A. Well, with the help of the Land Commissioner of the [294] Nevada Tax Commission, he and I kind of changed it, worked it over, Mr. Charles Fulstone.

Q. Is it your recollection that you did bring in the predecessor records to any extent? With respect to that land in making valuations were you governed to any extent by that?

A. Yes, I think so.

(Testimony of William D. Park.)

Q. What was your experience prior to 1923 with respect to valuations of land in the vicinity of Lake Tahoe or anywhere?

A. I was a blacksmith; I didn't have anything to do with that.

Q. You were a blacksmith. You had had no previous experience? A. No.

Q. And you called in the help of a Land Commissioner? A. Yes, sir.

Q. Someone else?

A. Yes; he and I worked it out.

Q. In making your subsequent appraisals you have continued year after year to make appraisals of this land, have you, of all land in Douglas County? A. Oh, yes, sir.

Q. And you made the statement, I believe, that in 1928 values had increased and, therefore, you increased and segregated the land. How did you learn that values had increased?

A. By the sales.

Q. What kind of sales? All sales? [295]

A. All sales of lake shore.

Q. All sales in Douglas County?

A. Lake shore land.

Q. Where did you learn of the prices received for those lands?

A. Well, they were recorded.

Q. Pardon me. They were recorded in your records? A. No; in the Recorder's office.

Q. Not the selling price? A. No.

(Testimony of William D. Park.)

Q. The selling price is never recorded in the Recorder's records, is it? A. No, I know.

Q. Only the transfer between the parties?

A. No, but I inquired the price of land up there and I know it had gone way up to what it had been the year before.

Q. Just from inquiry you learned from hearsay, we will say—— A. Yes.

Q. (Continuing) Persons you discussed it with that land prices were going up? A. Yes, sir.

Q. Did you make any detailed study from this evidence which you had heard? Did you plat out the land to distinguish whether the last sale represented an increase over the previous sale price of the same land? A. Yes, I did. [296]

Q. And you made comparisons?

A. Every year there was increases.

Q. Each year each sale indicated an increase?

A. Well, each year. I wouldn't say each sale, but each year indicated an increase.

Q. Yes. Well, now, Mr. Parker, you were the assessor in the year 1936? A. I was.

Q. And in that year as of what date in Nevada is the assessment made? A. March 1st.

Q. March 1st? A. Yes, sir.

Q. On March 1, 1938, these lands of Carson and Tahoe which you have just discussed had previously been sold to George Whittell, is that so?

A. Yes, they had.

Q. Do you know what price they had been sold for? A. No, I do not.

(Testimony of William D. Park.)

Q. Well, you appraised the land, did you not?

A. I did.

Q. And put an estimate on it? A. I did.

Q. From your recollection do you recall if you increased your assessment any over the previous year? [297]

A. I might have a little bit but not a great deal.

Q. Just a little bit?

A. I might have a little bit; I wouldn't say.

Q. Mr. Park, this was a very important sale, was it not, a very large tract of land?

A. It was.

Q. And you know it was sold? A. Yes, sir.

Q. But you did not at that time acquaint yourself with the selling price of that very large parcel of land? A. No.

Q. Didn't that constitute a very large percentage of the land in Douglas County in value?

A. It did.

Q. Some of the most valuable land in the county?

A. But I assessed most of it just as it was before; I didn't increase it.

Q. In this particular instance you were not governed by the selling price of the land?

A. No.

Q. Were there any other instances in which you were not so governed?

A. I don't know as I understand that.

Q. Well, in this instance you were not governed?

A. Well, I tell you we had the land, as I thought,

(Testimony of William D. Park.)

at a very [298] good value. We assessed it at \$120 an acre for all lake shore land, all those subdivisions along the lake were assessed at \$120.00 an acre.

Q. Yes.

A. And some spots of pasture land was assessed separate, but the back land was assessed at \$2.00 an acre.

Q. Just a moment. Before the year 1936, Mr. Park, all of the block that was sold to George Whittell was still owned by the Carson and Tahoe Lumber and Fluming Company. Do you recall how much you assessed that land for that year?

A. No, I do not, but it was not all owned by the Carson and Tahoe Lumber and Fluming Company that Whittell bought.

Mr. Helvern: We have the tax bills here in evidence, your Honor.

Q. (By Mr. Helvern) But I will say to refresh your recollection that the records of the company show that for their 11,161 acres of land in 1937 they paid on an assessed valuation of \$58,430.00

A. Yes, sir.

Q. Does that seem about right for those lands?

A. Yes, but that isn't all the land that Mr. Whittell bought. He bought other land besides that.

Q. He didn't buy other land from Carson and Tahoe?

A. Not from Carson and Tahoe, no.

Q. Your recollection is that you did slightly in 1938 [299] increase the value of this land?

A. Yes, I think so, yes.

(Testimony of William D. Park.)

Q. Do you now know approximately the amount paid for these lands by Mr. Whittell?

A. No, I do not.

Q. If I were to tell you it was \$300,000 would it surprise you, or did you know it was about that price? A. No, it wouldn't surprise me.

Q. It wouldn't surprise you? A. No.

Q. You increased the fifty eight thousand dollar value slightly when? In the year Mr. George Whittell bought the land?

A. We might have; we took all the holdings he got and kind of reclassified it, but it wouldn't be raised very much.

Q. If you remember that this was fifty-eight thousand in 1936, if you believe that that is true, approximately how high could you have raised it in 1938, or would you rather not say? You say you raised it slightly, you believe.

A. With the other holdings, I don't know, but I think it was around ninety thousand.

Q. To \$90,000?

A. With the other holdings that he had bought.

Q. What other holdings did Mr. Whittell buy?

A. He bought Skyland Camp and he bought Spooners. [300]

Q. In Douglas County?

A. In Douglas County, yes.

Q. Do you know from whom he bought that other land, certain lands?

A. Skyland camp was from Mr. Daly, Frederick

(Testimony of William D. Park.)

Daly, and he bought Spooners from the Fulstone estate.

Q. Did he buy any from the Bliss Company, in Douglas County?

A. I don't think he did in Douglas County.

Q. Not that year; the previous year?

A. He might have, but I don't recall.

The Member: Any other questions?

Q. (By Mr. Helvern) Mr. Parker, I hand you a bill or a statement which purports to be a statement of school and county taxes in Doguas County for the year 1913 assessed to Carson and Tahoe Lumber and Fluming Company.

What is the value, the assessed value of the land shown?

Mr. Murray: If your Honor please, I don't believe this witness can identify this. He became Assessor in '23. He is handling many documents. I object to that.

The Member: I take it it is an official document of his office the same as the records which he read for 1912.

Mr. Murray: Well, I would like to look at it.

Mr. Helvern: These are official records of 1912.

Mr. Murray: (Examining documents) Yes, that is all right. I will admit this is—— [301]

Mr. Helvern: (Interposing) Official?

Mr. Murray: Yes.

Q. (By Mr. Helvern) What is the amount of the assessment for all those lands, the total assessed value? A. \$22,465.

(Testimony of William D. Park.)

Mr. Murray: No.

Q. (By Mr. Helvern) (Indicating) This figure?

A. \$22,465 and \$3,370.

Q. And a total of about \$27,000?

A. Twenty-seven thousand.

Q. Is that correct? A. Yes, sir.

Q. Approximately \$27,000. I hand you this paper which purports to be your tax bill against the Carson and Tahoe Lumber and Fluming Company for the year 1937 as per your assessment roll. In what amount is it valued as at that date?

A. \$58,430.00.

Q. \$58,430.00? A. Yes, sir.

Q. Slightly more than half, or slightly more than twice what you valued this land at in 1913?

A. Well, I didn't value it in 1913.

Q. Pardon me. Slightly more than half at which it was valued by your predecessor in 1913? [302]

The Member: Slightly more than twice.

Q. (By Mr. Helvern) Slightly more than twice.

A. Yes, sir.

Mr. Helvern: I submit as Petitioner's Exhibit the original tax bill for the year 1913 and for the year 1937.

The Member: No objection?

Mr. Murray: No objection.

The Member: Accepted in evidence.

Any other questions?

The Clerk: One exhibit, do you want this?

Mr. Helvern: One exhibit, yes.

The Clerk: Petitioner's 23.

(Testimony of William D. Park.)

(The original tax bills for years of 1913 and 1937, so offered and received in evidence, were marked Petitioner's Exhibit 23, and were made a part of this record.)

Mr. Helvern: No more questions.

Mr. Murray: One more question, your Honor please.

Redirect Examination

Q. (By Mr. Murray) Mr. Park, I understood you to say that some Land Commissioner consulted with you and advised you in fixing the assessment rolls? A. He did.

Q. Who was he? A. Charles Fulstone.

Q. Charles Fulstone. Is he the man that owns Skyland and [303] a lot of other property that we talked about yesterday here?

A. He is. He was Land Commissioner of the Nevada Tax Commission.

Q. He advised you these were the prices to place on there? A. We worked them out together.

Q. But it was his opinion, too?

A. Yes, it was.

Mr. Murray: That is all.

Mr. Helvern: No more questions.

The Member: That is all.

Witness Excused.

The Member: Call your next.

Mr. Murray: I will call Mr. Griggs.

C. C. GRIGGS

a witness on behalf of Respondent, was duly sworn and testified as follows:

The Clerk: State your name, please.

The Witness: C. C. Griggs.

Direct Examination

Q. (By Mr. Murray) Mr. Griggs, what is your present position?

A. I am technical adviser on the technical staff of the Bureau of Internal Revenue.

Q. How long have you been with the Internal Revenue Bureau?

A. About twenty years. [304]

Q. And do you have any specialty with the Internal Revenue Bureau?

A. Well, I review cases that are headed for litigation, income tax cases headed for litigation.

Q. No, but I mean what is your profession? What was your profession before you came into the Internal Revenue Bureau?

A. My profession was as mining engineer.

Q. How many years experience did you have as a mining engineer?

A. From—well, I worked during the summer vacations while I was at the University and I graduated in 1897 and until the war—I entered the army in 1918—I was active in mining operations, operating mining companies.

Q. Did you do any civil engineering?

A. I did.

(Testimony of C. C. Griggs.)

Q. And did you have experience in working on maps, making maps and surveys and all?

A. Yes, I put in nearly three years on railroad surveys and a good many years while I was operating mines I made my own surveys and made my own maps showing the operations.

Q. I will ask you: Have you ever been on the east side of Lake Tahoe, Nevada?

A. I was there during the month of May, 1941.

Q. And at that time did you have any occasion to examine certain lands there?

A. I was assisting you as counsel in preparing evidence [305] for this trial.

Q. I will show you a map which is Respondent's Exhibit L in evidence and ask you if you have ever seen that map before?

A. (Examining map) I made the map, that is, I didn't make the original map. That was made by the State Highway of Nevada, I believe, but I filled in all the colors, the property shown by the different colors.

Q. Yes. Well, now, then, are you familiar with the location on this map of Zephyr Cove?

A. I am.

Q. What color is it? Well, how would you identify it here on this map that I am showing you?

A. It is red and hatched in purple, or violet, I believe.

Q. Well, that takes in a lot of territory. You will have to be more specific.

A. Zephyr Cove is shown from——

(Testimony of C. C. Griggs.)

Q. (Interposing) From Skyland Camp and Zephyr Point? It is on the lake between Skyland Camp as marked on this map and Zephyr Point, is that it? A. It is.

Q. Were you ever on that property?

A. I was; I stayed there several days.

Q. And did you examine it? Did you find any beach there? A. Oh, yes, sir.

Q. Did you examine the beach? [306]

A. I looked at the beach.

Q. I will show you a photostat and ask you if you have ever seen that photograph before?

A. (Examining photograph) I took this photograph.

Q. And what is the photograph of?

A. I have marked it on the back, identified it as Zephyr Cove, Lake Tahoe, part of Sections 3 and 10, Township 13 north, range 18 East, Douglas County, Nevada, photographed by C. C. Griggs, May 17, 1941.

The Member: You have some other photographs there, do you, Mr. Murray?

The Witness: I have four photographs.

The Member: And they are all marked on the back, identified as to what they are?

The Witness: Yes, sir.

The Member: Has counsel for the Petitioner seen them?

Mr. Murray: No. Mr. Griggs took them all.

The Member: I suggest the possibility that they be introduced in evidence by stipulation.

(Testimony of C. C. Griggs.)

Mr. Helvern: Right.

Mr. Murray: I will have to ask him a couple of questions about them.

Mr. Helvern: No objection.

The Member: You offer them in evidence, do you Mr. Murray? [307]

Mr. Murray: Yes, sir.

The Clerk: One exhibit or four?

Mr. Murray: Four. I would like to show on the record, however, that two of them, as marked, are of Zephyr Cove from different views, and two of them, as marked, are of Marla Bay, which is south of Zephyr Cove.

The Member: They are identified on the back?

Mr. Murray: They are identified on the back.

The Member: I mean, you can look at the back and tell the place where the photograph was taken and the date, I take it?

Mr. Murray: I think that is right.

Q. (By Mr. Murray) Isn't it, Mr. Griggs?

A. They are identified.

The Member: All right.

The Clerk: Respondent's Exhibits R, S, T, and U.

(The four photographs so offered and received in evidence, were marked Respondent's Exhibits R, S, T, and U, and were made a part of this record.)

Q. (By Mr. Murray) Mr. Griggs, while you were at Lake Tahoe did you have any occasion to

(Testimony of C. C. Griggs.)

examine a section known as Section 25, Township 13, Range 18? A. I did.

Q. Did you locate that section?

A. I did. [308]

Q. And did you examine it in any detail?

A. I was on the property, made an examination of it.

Q. And what did you observe on that section?

A. I observed that that was one section that was not cut over, had never been cut over and was standing in virgin timber with trees very large.

Mr. McLeod: Pardon me. What section are you talking about?

Mr. Murray: Section 25, Township 13, Range 18.

Q. (By Mr. Murray) I show you a map which is in evidence as Respondent's Exhibit K and ask you if you can identify here Section 25, Township 13, Range 18?

A. It is this square cross hatched in black south of the rest of the property that has been identified on the map as being the lands owned by the Carson and Tahoe Lumber and Fluming Company on March 1, 1913.

Q. All right. Now, would you state as to what the number of the trees of the virgin timber for a certain space and all would be?

A. I am no expert on timber but I did count—I estimated an acre in area in two different places and I counted from 17 to 19 trees of 24 inches in diameter or more. Some trees I measured were over four feet in diameter.

(Testimony of C. C. Griggs.)

Mr. Murray: That is all, if your Honor please.

The Member: Any questions? [309]

Cross Examination

Q. (By Mr. Helvern) Mr. Griggs, you stated that this was virgin timber and some of it was four feet in diameter.

A. Yes, sir.

Q. And you made this investigation at this time quite recently?

A. I did.

Q. Would that property, in your opinion, be of approximately the same virgin timber and the same value in 1913 that it is now?

A. I stated in my previous remark that I am no expert on timber, although I am testifying. All I am testifying is what I saw and I say it was virgin timber because there were no stumps and there was no evidence of timber ever having been cut from that property.

Q. And you identified trees on that land as being four feet in diameter?

A. I measured several with my tape measure.

Q. Yes. Then, I assume from your education as an engineer and your familiarity with trees that you know how long it takes a tree to grow four feet in diameter?

A. Well, I certainly know that.

Q. Yes. A. But I am not——

Q. (Interposing) I don't think you need to explain.

A. But I am not stating what my opinion is.

(Testimony of C. C. Griggs.)

Q. From your knowledge of this property do you think it would be easy or difficult to log this land, the trees off the property.

A. Well, I would say it would be very easy to log them off of that property. As a matter of fact, an improved highway cuts across that section at the present time. I was over that highway to Minden and it was—as a matter of fact, that is adjacent to some of those very large streams.

Q. Isn't that on the side of a hill on a mountain?

A. Well, not precipitous. Logging operations are not—well, I say I am no expert on timber, but there will be timber men to follow and I think they will say that the logging operations are not difficult on the side of the mountain.

Q. How far from the shore line of Lake Tahoe?

A. Well, I would say—it is shown on the map. The map will speak for itself.

Q. From your observation and familiarity with this map tell us from the map the distance?

A. The edge, the west edge of Section 25 is a little less than two miles from the shore.

Q. Yes, and the land slopes down toward the shore, is that not so, all of that land in there slopes toward Lake Tahoe from the mountains beyond?

A. There is water on that land and it drains toward Lake Tahoe. [311]

Q. Yes. Are those pine trees or fir trees?

A. As I say, I am no expert on timber. There will be other witnesses to testify as to that.

Q. Yes. And you are not familiar with the fact

(Testimony of C. C. Griggs.)

as to the manner in which timber is brought down to the water, then, for logging operations apparently?

A. I am familiar, but that is not my business and I am not testifying with respect to anything about logging operations. I am merely testifying to the fact that I was on the land and I am telling you what I saw.

Q. You stated that the road made it very easy. You drew a conclusion that the fact that the road is there now would make it easy to log off that land?

A. At the present time I would say that that would be a great help, at least.

Q. Yes. I assume from that that you have concluded the only way to get the timber off would be to take it on the highway and haul it off?

A. I am not discussing the possibilities.

Q. Then, you don't know how they would take the timber off?

A. I am confining my remarks and testimony entirely to what I saw when I was on that property.

Mr. Murray: I have just a couple of questions.

Redirect Examination

Q. (My Mr. Murray) Do I understand you to say you saw some [312] water on the property?

A. Yes, sir.

Q. What seemed to be the source of it, do you know?

A. Well, it seemed to be—I didn't follow it up to its ultimate source but it appeared to be springs coming from the side of the mountain.

(Testimony of C. C. Griggs.)

Q. The water you saw, was it fairly considerable in amount or what?

A. Well, it would fill a box, I would estimate, 18 inches wide and possibly 10 inches deep.

Q. Did you take any pictures while you were up on Section 25?

A. I took two pictures of the trees.

Q. I show you these two pictures and ask you if those are the two pictures you took?

A. (Examining pictures) Those are the pictures I took on Section 25.

The Member: Any objection to the introduction in evidence of these two pictures of these trees?

Mr. Helvern: No.

The Member: Do you offer them in evidence?

Mr. Murray: I offer them in evidence.

The Member: Received.

(The two photographs so offered and received in evidence, were marked Respondent's Exhibits V and W, and were made a part of this record.) [313]

Mr. Murray: I have one more quick witness, but the other two between them will take certainly a half or three-quarters of an hour.

The Member: Well, we will take the quick one.

Mr. Murray: Mr. Smith, please.

WILLIAM H. SMITH

a witness on behalf of Respondent, was duly sworn and testified as follows:

The Clerk: Your name, please?

The Witness: William H. Smith.

Direct Examination

Q. (By Mr. Murray) Mr. Smith, what is your occupation?

A. My present occupation is Associate Highway Engineer, Public Roads Administration, United States Government.

Q. What are your duties as Associate Highway Engineer?

A. Well, they have varied since I started employment with the Federal Government. I have been with them since 1926. 1926 up until about '35 I was on forest highway construction and survey work, and from 1930 to 1935 I had charge of the surveying and construction of all the roads on the Nevada side of Lake Tahoe which are national forest highways.

Q. What was your education before you went to work for the Public Roads Administration?

A. Why, I am a graduate, civil engineer, University of [314] California, class of 1917. After I graduated I served in the Army for three years, First Lieutenant, Corps of Engineers. I then started work for a railroad company, Southern Pacific, worked with them for approximately six months. Then, I worked for Stone & Webster on hydroelectric power work and in 1921 I started my

(Testimony of William H. Smith.)

work as a highway engineer working for the California Highway Department in this state for approximately four years. In 1926 I started my work with the Federal Government.

Q. Now, I understood you to say that you had charge of the road improvements on the Nevada side of Lake Tahoe, from '29 to '35, is that right?

A. From 1930 to '35.

Q. 1930 to '35?

A. That is the survey and the construction work.

Q. Well, when was the first time you went to Lake Tahoe in connection with this road improvement project?

A. It was in 1930. Of course, I had been to Lake Tahoe previous to that time but it was on unofficial business.

Q. Had you ever been over on the Nevada side of Lake Tahoe before that time?

A. I was over there in 1928, yes, but unofficially.

Q. What section of road did you survey and work on on the Nevada side of Lake Tahoe?

A. Well, the entire route from State Line. That extends [315] from approximately the south state line near Lakeside or Bijou, California, extends via Zephyr Cove, Glenbrook, up to Spooners, and that we term the Glenbrook National Forest Highway.

Then, there is another section. The Lake Tahoe National Forest Highway extends from Spooners via Incline to Calneva which we call the north state line, so I covered the entire Nevada side of Lake Tahoe.

(Testimony of William H. Smith.)

Q. What was the condition of the roads from Glenbrook down to the south state line past Zephyr Cove when you first went up there in 1930?

A. Well, I would call them old unimproved roads. They were corrugated and not very well maintained. The County assumed the maintenance and responsibility and they were in general, I would say, one way roads, very sharp curvature and poor sight distance. They weren't constructed on any modern highway standards.

Q. What development was there around Zephyr Cove at that time in the way of cottages or hotels or anything like that?

A. There was very little development adjacent to the old road at Zephyr Cove. There were some summer homes toward the south end of the cove that had been constructed, that I observed, but that was all. There was no development as I call development adjacent to the old road.

Q. I show you a photograph and ask you if you recognize it? [316]

A. (Examining photograph) I do. This was taken——

Q. (Interposing) What is it?

A. It is a photograph of the old existing road, a portion of the Lake Tahoe National Forest Highway. The description is on the back.

Do you want me to read the description?

Q. Well, testify from it.

The Member: Is it your purpose to introduce these in evidence?

(Testimony of William H. Smith.)

Mr. Murray: I have a picture of the road as it was and the road as it is.

The Member: They both have the descriptive matter on the back indicating what they are and the date they were taken?

Mr. Murray: That is right. They are from the files of his office.

The Member: Any objection to the introduction?

Mr. Helvern: No, not as long as the dates are shown on the back.

The Member: All right, admitted in evidence.

(The photographs so offered and received in evidence, were marked respectively Respondent's Exhibits X and Y, and were made a part of this record.)

Q. (By Mr. Murray) When you first went up on that road near and around Zephyr Cove how much time did you spend [317] on your survey?

A. You mean on the actual survey works, surveying the alignment?

Q. Yes.

A. You mean just in the vicinity of Zephyr Cove?

Q. Well, from Glenbrook down to the south state line?

Mr. McLeod: May I hear the question?

The Member: The question is when he was first there how long did he stay in that vicinity?

A. I stayed there from—well, I was actively engaged up there every summer. Of course, the win-

(Testimony of William H. Smith.)

ters the contractors would close down their work. I conducted the survey work in connection with the highway construction work, doing the survey work prior, of course, to the actual highway construction work.

The survey work from Glenbrook, I would say, to the State line covered a period of two years. We would survey a section at a time. That runs about 6 to 10 miles in length.

Q. Did you at that time observe during the summer months or during the good period the number of people who came in around there?

A. I did; we took traffic counts.

Q. You took official traffic counts?

A. Well, our department did. They were taken under my direction. [318]

Q. Well, have you got some figures with you from which you can——

A. (Interposing) I have copied some figures from our traffic counts which we turned over to the Nevada State Highway Department.

Q. Will you state what they were from something prior to 1930 to show the difference between the traffic counts, say, in 1928, if you have it, and then 1935 or '6? Do you have that?

A. Well, I can give a description of the stations as to where the counts were taken. I have copied these—these are some notes I have made from the official traffic census that is on record with the Nevada State Highway Department. It is an official publication. The first station that we took

(Testimony of William H. Smith.)

counts at was located at Spooners. It is on U. S. Highway No. 50. The first counts were have any record of there were taken in 1931. They were taken under my direction while I was up there. The traffic counts were taken, we will say, in the direction first towards Glenbrook at Spooners' station; that is at a junction with the Lake Tahoe National Forest Highway and the Glenbrook National Forest Highway, the total number of vehicles counted in 1931. Now, these counts constitute a 16-hour period, from 6:00 a. m. to 10:00 p. m. for seven continuous days during a weekly period about the middle of July of each year. [319]

The total number of vehicles counted in 1931 at Spooners in the direction towards Glenbrook was 504. In 1935, the same period of count, approximately the same time of the year, total vehicles counted was 822. In 1940 it was 1,355. That was an increase from 1931 to about three times the amount of traffic. Then, we took another count at Spooners in the direction towards Incline. That is on the Lake Tahoe National Forest Highway and leads to the north end of the lake.

In 1931 the traffic counts on that highway were 127, in 1935, 446; in 1940, 686, or an increase of approximately five times the traffic from '31 to 1940.

Now, I have other stations here, one located at Incline, if you care for that.

Mr. Murray: No, I wouldn't care for any more. That is all. [320]

Mr. Murray: If your Honor please, I would like

(Testimony of William H. Smith.)

to offer in evidence a quit-claim deed, certified copy of a quit-claim deed from the Treasurer of Douglas County to S. C. Bigelow on the 23rd of July, 1913, which describes certain property that is on the map and it was marked for identification as Respondent's Exhibit D yesterday.

The Member: No objection.

Mr. Helvern: No objection.

The Member: Accepted in evidence.

(The quit-claim deed, dated July 23, 1913, so offered and received in evidence, was marked Respondent's Exhibit D, and was made a part of this record.)

Mr. Murray: I would like to offer in evidence as [321] Respondent's Exhibit a certified copy of a deed from H. F. Dangberg Land and Livestock Company to William McFaul on August 8, 1911. It refers to the piece of property that Mrs. Allerman testified about this morning. This is a certified copy of the deed.

The Member: No objection?

Mr. Helvern: No objection.

The Member: Accepted in evidence.

(The certified copy of deed dated August 8, 1911, so offered and received in evidence, was marked Respondent's Exhibit Z, and was made a part of this record.)

Mr. Murray: I would like to ask Mr. Smith a couple of questions on direct.

(Testimony of William H. Smith.)

Direct Examination (Resumed)

Q. (By Mr. Murray) Mr. Smith, I understood you to testify that you had charge of the construction of the new road reaching from Glenbrook to the south border of the state on the Nevada side of Lake Tahoe?

A. Yes, sir.

Q. To the junction of the California and Nevada line on the south, is that right?

A. That is correct.

Q. Was the new road which you discussed this morning placed on the same roadbed as the old road that was there along in that locality? [322]

A. No, it was not. We made a new survey and a new location and in general the new highway was located east, or further away from the present road, that is, it was located further from the lake shore.

Q. Did you have charge of the making of the maps which show where the old road was and the new road is with respect to the location right near Zephyr Cove?

A. I did.

Q. I hand you a map pieced together from two maps and ask you if that looks like the map showing the old road past Zephyr Cove and the new road past Zephyr Cove as the map which you were responsible for?

A. (Examining map) It is; that is the map.

Mr. Murray: I offer this in evidence, if your Honor please.

The Member: No objection?

Mr. Helvern: No objection.

(Testimony of William H. Smith.)

The Member: Accepted in evidence.

The Clerk: Exhibit AA.

(The map so offered and received in evidence was marked Respondent's Exhibit AA, and was made a part of this record.)

Q. (By Mr. Murray) Now, Mr. Smith, have you had occasion at my request to make a computation of the area between the old road and the lake at Zephyr Cove? [323]

A. I did.

Q. And could you state approximately in acres how much land there was between the old road and the lake at Zephyr Cove?

A. Well, in Section 10—that covers the Section which I estimated, between the old existing road as it existed in 1930 and the lake shore—of course, the lake shore fluctuates depending upon the elevation and the amount of water in it—there is approximately 40 acres of land.

Q. And did you make a computation of the area in acres that there are now between the new road and the lake at Zephyr Cove in Section 10?

A. I did.

Q. And approximately how many acres of land are there now between the highway and the lake front at Zephyr Cove?

A. Between the new highway as it is located at present and being used there are approximately 68 acres between the lake shore and the new highway, that is, the right of way line adjacent to the lake shore, not the center line of the highway.

(Testimony of William H. Smith.)

Q. Did you enter into negotiations with respect to the locating and the acquisition of the right of way for the new road?

A. The Nevada State Highway Department Right of Way Agent entered into negotiations for a right of way. We did not do that. However, I was present whenever there was a conflict [324] regarding right of way matters. We had a number of conflicts with private property owners adjacent to the lake relative to the location of the new highway.

Q. Will you state what the basis of the conflict was?

A. Well, in general, the property owners wanted us to locate the new highway further away from the lake shore in order to make a larger area of land available adjacent to the lake so that they would increase their acreage and would not have trouble on account of sewage disposal, you might call it.

Q. Did those persons who contested, or who insisted at these meetings that the new road be placed further back from the lake than the old road state what their reasons were for that?

Mr. Helvern: I object to the statement as hearsay evidence, as to the reasons of these persons.

The Member: Overruled.

Q. (By Mr. Murray) Did they state what their reasons were?

A. In general they didn't state directly. Of course, we engineers inferred that the reason was that——

(Testimony of William H. Smith.)

Mr. Helvern: (Interposing) Objection.

The Member: Objection sustained.

Mr. Murray: That is out.

Q. (By Mr. Murray) What did you say, if anything, about it? [325]

A. I don't remember their exact words. It was a long time ago, but, in general, I went over the surveyed lines with the State Highway Department Right of Way Agents and their engineers and the property owners. I, in general, at various places had run sometimes as high as two or three surveyed lines running alternately so that we could finally agree upon a location for the new highway. In general, the property owners all of course, wanted the locations that were furthest away from the lake shore. That generally was true. I don't remember exactly what their statements were.

Q. Do you know whether that was true of the road location at Zephyr Cove?

A. Well, at Zephyr Cove, of course, at that time we had difficulty in getting the right of way through the land owned by the Zephyr Cove properties, Inc., and Mrs. Church at that time insisted on having the road located further away from the lake shore. We did compromise on a location where we could get our engineering standards for construction and still come to some agreement with the property owners as to the location.

Q. Were any agreements necessary in that respect relating to the Carson and Tahoe Lumber and Fluming Company lands?

(Testimony of William H. Smith.)

A. No, sir, so far as I know we had no right of way trouble with any members of the Carson and Tahoe Lumber and Fluming Company [326]

Q. But the new road at Zephyr Cove is some distance back from the lake, from the old road?

A. It is.

Mr. Murray: That is all.

Cross Examination

Q. (By Mr. Helvern) Mr. Smith, in your direct testimony I believe you stated that prior—or that in about—it isn't clear here.

When did you first inspect the roads on the Nevada side of Lake Tahoe? You stated that in your direct examination.

A. When I was first assigned to road work in that locality.

Q. Yes. At what time? You said something about the condition of the roads at the time that you went there. In what year was that?

A. That was in 1928 when I first drove over the roads on the Nevada side of Lake Tahoe.

Q. You described the condition of the roads at that time? A. Yes, sir.

Q. Are you familiar with the condition of the roads prior to that time?

A. Not on the Nevada side of Lake Tahoe.

Mr. Helvern: That is all.

Mr. Murray: That is all.

The Member: That is all.

Witness excused. [327]

Mr. Murray: Mr. Barnum, please.

MILLARD McKINLEY BARNUM

a witness on behalf of Respondent, was duly sworn and testified as follows:

The Clerk: State your full name, please.

The Witness: Millard McKinley Barnum.

The Reporter: Spell it, please.

The Witness: M-i-l-l-a-r-d M-c-K-i-n-l-e-y B-a-r-n-u-m.

Direct Examination

Q. (By Mr. Murray) Mr. Barnum, what is your position, please?

A. Senior Forester of the Forest Service.

Q. How long have you been occupied in that position.

A. Since 1919, not in the same division.

Q. But in the Forestry Department?

A. In the Forestry Department?

Q. When did you enter it? A. 1919.

Q. What was your first assignment in the Forestry Service?

A. District Ranger.

Q. At what location?

A. On the Klamath National Forest from which I moved two years afterwards to the Shasta National Forest and then in 1923 to the Tahoe National Forest.

Q. Well, in 1923, then, you were a Ranger. Was that your [328] title then

A. I was Junior Forester.

Q. On the Lake Tahoe National Forest

A. Yes. During the period from 1919 to 1923 I

(Testimony of Millard McKinley Barnum.)

went to school two winters in the University of Montana, Forestry School at Montana and passed the junior Forestry examination.

Q. That was a promotion over a Ranger, Junior Forester? A. Yes, sir.

Q. What area is covered by the Lake Tahoe National Forest?

A. It covers the area from the Nevada side of Lake Tahoe around to McKenney Creek on the north side and around to McKenney Creek on the west side, and the Eldorado Forest is on the southern side.

Q. Well, it takes in the east side of Lake Tahoe in Nevada?

A. East side, yes.

Q. And you went there in '23, and how long were you there? A. Until 1930.

Q. Did your position change any from Junior Forester while you were there at the Lake Tahoe Forest?

A. Yes, through the different grades to Assistant Supervisor, but during the entire period I handled the land acquisitions on the forest.

Q. Your specialty was land acquisitions?

A. Yes, sir.

Q. During the period 1923 to '30 did you have occasion to go [329] on the lands owned by the Carson and Tahoe Lumber and Fluming Company east of the lake and in Nevada?

A. Yes, a good many times.

(Testimony of Millard McKinley Barnum.)

Q. A good many times. Did you inspect it in any degree in the early days of your being there?

A. In a general way, yes, and examined some public domain land which was added to the national forest during that period, intermingled with the Carson property.

Q. Now, did the Lake Tahoe National Forest take in the northeast section of the lake back from the lake too? A. Yes.

Q. How far around on the north did it go, north of the lake?

A. Well, all the drainage that drains into Lake Tahoe.

Q. I see; up to the pass on all sides?

A. And further too.

Q. But at least that?

A. Some of it outside as you go north.

Q. Well, when you went there in 1923 was there any kind of road around the northeast corner of the lake from Brockway, I think it is, around into Nevada?

A. No, no; the road that I went on was from Carson City.

Q. Oh, you came up from Carson City?

A. Yes.

Q. In 1923? A. Yes, sir. [330]

Q. Do you remember the condition of that road when you came up there?

A. Yes, a very poor road.

Q. How did you come up, what transportation?

(Testimony of Millard McKinley Barnum.)

A. I had an automobile.

Q. How about the grades on the road?

A. They were very steep; part of it you had to come in low gear.

Q. Then, any time after that while you were on the Lake Tahoe National Forest was any attempt made to put a road around that northeast corner from Brockway over to——

A. (Interposing) Between 1926 and 1928 the Forest Service built a one-way road from Incline, or from the state line around to the connection with the Glenbrook road at Spooners.

Q. I see. Is that the first——

A. (Interposing) It is just a one-way road, not very good curvature.

Q. The Forestry Department put that road in?

A. Yes, as a pioneer road to start travel around the lake, so they would have a means to travel around the lake to increase use.

Q. Yes.

A. And then following that the Bureau of Public Roads, which is part of the Department of Agriculture, widened it [331] and then gradually made it a fairly good highway.

Q. When was that widening done, do you recall?

A. Following '28.

Q. Were you up there when Mr. Smith, the last witness, was in charge of building and improving the road?

A. Well, I didn't know Mr. Smith, but I knew

(Testimony of Millard McKinley Barnum.)

the Bureau of Public Roads' men in a general way and the work that they did.

Q. Yes. Well, when you left the Lake Tahoe National Forest what did you do in 1930?

A. I went to the Trinity Forest as Forest Supervisor and was there through 1933.

Q. Where is the Trinity National Forest?

A. Out west from Redding, between there and Eureka.

Q. Then, what was your next move?

A. Then, in 1934 I came to San Francisco, or the Regional Office of Western Nevada and California, in charge of the Forest Code, and I was in that activity until July 1935, and from 1935 to the present date I have been Senior Forester in charge of land acquisition and land planting for the Forest Service.

Q. I see. Since 1935 you have been in charge of land acquisition for the Forestry Service in the district that takes in California and western Nevada?

A. Yes, sir. [332]

Q. During that period have you had anything to do with the acquisition by the Forestry Department of lands for the public in that general vicinity?

A. Yes, I have.

Q. Have you a map which indicates the land, the purchase of which by the Forestry Service you had something to do with?

A. Yes. During this period of from July 1, 1936 to June 30, 1940, this Region acquired approximately 440,000 acres in California and Western

(Testimony of Millard McKinley Barnum.)

Nevada and part of this is covered on this map. One of the larger purchases was the land from the Hobart Estate in the vicinity of Hobart Mills.

Q. What does that consist of?

A. Of about 55,000 acres at an average rate of \$2.10.

Q. What was the character of that?

A. The bulk of it was \$2.00 with a small amount around Hobart Mills and Truckee at \$3.50 which brought it up to \$2.10, and it is cut-over land with a pretty good stand of second growth and a very good stand of range, both bitter brush and meadow, and this purchase from them included the right of way for the two main streams, Little Truckee and Carter Creek, and then the land where the town of Hobart Mills is situated.

Q. Yes.

A. Now, that is one acquisition. Then——

Q. (Interposing) Just a minute, please. [333]

Was this map that you are looking at made either by you or under your supervision?

A. Under my supervision, yes.

Mr. Murray: I offer this in evidence as Respondent's Exhibit.

Mr. Helvern: No objection.

The Member: Accepted in evidence.

(The map so offered and receive in evidence was marked Respondent's Exhibit BB, and was made a part of this record.)

(Testimony of Millard McKinley Barnum.)

The Witness: Now, there are several other purchases on that map besides the Hobart Mills.

Q. (By Mr. Murray) Yes, I am going to take them up in a minute,

Now, in what color on this map, which is now marked Respondent's Exhibit BB, is the Hobart land of which you were speaking a while ago shown?

A. (Examining map) We have the legend here that shows each of the acquisitions. The Hobart Mills is pink.

Q. That is pink?

A. This one (indicating).

The Member: The witness says it has legends explaining the map.

Q. (By Mr. Murray) The legend is here (indicating). Was that legend made under your supervision? [334]

A. Yes, that was part of the map.

Q. Well, now, was there any land nearer the lake than Hobart Mills property which was purchased by the Forestry Department which came under your supervision?

A. Yes. We acquired from the Carson and Tahoe Lumber and Fluming Company and Eldorado Lumber and Fluming Company over 7000 acres.

Q. When, please?

A. In nineteen—offered in '36 and consummated in '38, 1938, at the south end of Lake Tahoe.

Q. And that is indicated on this map, is it?

A. As cross hatched and indicated in the legend.

(Testimony of Millard McKinley Barnum.)

Q. In the legend. Do you remember how much the Government paid for that land in 1938?

A. \$3.00 for that particular land from this company and also the land in the vicinity of Zephyr Cove.

Q. Well, now, on this map that we are looking at, Respondent's Exhibit BB, there is some land colored in pink which is on the east side of Lake Tahoe, including Zephyr Cove, and going north and south a ways there as shown. Is that the land you mean that was offered by Carson and Tahoe Lumber Company?

A. Yes. The negotiation was carried on with Mr. Murphy of the company and the Forest Division which Mr. Weber represented, and the offer was made from Mr. Murphy to Mr. Weber of both tracts. [335]

Q. And could you state what this offer you are speaking of was with respect to this land?

A. \$3.00.

Q. For what?

A. Well, the offer was made for \$3.00 of the two tracts.

Q. \$3.00 for what? A. Per acre.

Q. For either one or both of the tracts that you are speaking of?

A. Yes, and we had a limited amount of money and, therefore, we picked the best purchase which was the land on the south end of the lake. We made a tentative examination of both and then chose the

(Testimony of Millard McKinley Barnum.)

tract on the south and then made a detailed examination of that.

Q. Did you participate in an examination of both the land that you bought and the land that was offered that you didn't buy?

A. Mr. Weber made the examination and I checked it.

Q. You checked it? A. Yes, sir.

Q. Then, is it your opinion that the land that you did buy south of the lake from Carson and Tahoe Lumber Company was of more value than the lands that were offered by Mr. Murphy?

Mr. Helvern: I object to his opinion. I think this is incompetent. The witness is not qualified as a judge [336] with respect to that.

The Member: Objection sustained.

Q. (By Mr. Murray) Well, do I understand that you did inspect both these properties?

A. Yes, sir.

Q. And you decided to buy the land south of the lake, that the Government should buy it?

A. That is right.

Q. You approved it?

A. Yes; then we purchased it at \$3.00 an acre.

Q. Now, how many other parcels of land around Lake Tahoe shown on this map, Respondent's Exhibit BB, did you examine and approve for purchase by the Forestry Service, United States Forestry Service?

A. The Bank of Nevada offered some 18,000 acres that is shown in blue on the map and ex-

(Testimony of Millard McKinley Barnum.)

plained in the legend, and they advertised that in the paper for public bids and they got no bids, and then they sold it to the Forestry Service for 66 cents an acre.

Q. And that is shown here on the map?

A. Yes, that is shown on the map.

Q. Now, did you have something to do with that purchase? A. Yes, sir.

Q. Did you examine that property?

A. I checked it. The members of the Tahoe National Forest [337] made the examination and I reviewed it in the field and checked it and made the recommendation for the purchase.

Q. Now, how many other parcels of land shown on this map did you check and approve that were actually purchased by the Forest Service?

A. One more on the south end of the lake from William Greuner, 480 acres.

The Reporter: Spell that, please.

The Witness: G-r-e-u-n-e-r.

Q. (By Mr. Murray) When was that? Was that purchased by the Forestry Service?

A. Yes; that was in '38. It was intermingled with the Carson and Tahoe Lumber and Fluming Company's land on the south end of the lake, and that is also shown in a separate legend.

Q. How much did the Forestry Service pay for that? A. \$3.00.

Q. \$3.00 an acre? A. Yes, sir.

Q. Now, is that all the purchases of land shown on this map that you had supervision and control of?

(Testimony of Millard McKinley Barnum.)

A. We made examinations of other tracts, but never consummated them.

Q. Well, from your examination of this land of the Hobart Company which you stated you approved at an average of [338] \$2.10 an acre and your examination of the land south of the lake that you approved the purchase of from the Carson and Tahoe Company and from that other party you just mentioned—what is the name? A. Greuner.

Q. (Continuing) —Greuner, and your examination of the land of the Carson and Tahoe Lumber Company east of the lake near Zephyr Cove, north and south, and other parcels of land in that locality that you have examined, how do you think the Carson-Tahoe land on the east side of the lake, except for the lake front, compares with the Hobart land and the land that was bought from Carson and Tahoe south of the lake?

Mr. Helvern: I object.

The Member: What do you mean, “compares”?

Mr. Murray: Compares in value.

The Member: Compares in value? Objection sustained. This man has not been qualified as an expert on market values. He probably is an expert on values so far as the National Forestry Service is concerned but we are not interested in that. We are just interested in the market values. I don't think the witness has been qualified in that regard, Mr. Murray.

Q. (By Mr. Murray) Mr. Barnum, I show you a map which is in evidence as Respondent's Exhibit

(Testimony of Millard McKinley Barnum.)

K and ask you if you can locate on that map Section 25, Township 13 north, Range 18 [339] east?

A. (Examining map) Yes.

Q. You can locate it. How is it indicated on that map?

A. A black cross hatching with a written in "Section 25."

Q. Are you familiar with that parcel of land?

A. Yes; it is owned by the Clover Valley Lumber Company.

Q. You say it is owned by the Clover Valley Lumber Company? A. Yes, sir.

Q. How do you know that it is owned by the Clover Valley Lumber Company?

A. They made an offer of that and other lands to the Forestry Service a few years back.

Q. And did the Forestry Service, did they present any cruising figures with respect to it in their offer?

A. At the time they made the offer they put a cruising party in the field and cruised it, and a member of our office checked with him, spent a few days with him on these areas, and at a recent—this month we had our own Ranger at Carson City examine this particular section.

Q. And what did the report show the character of that Section 25, Township 13, Range 18, is?

A. Well, it showed a few trees cut but practically the entire section was virgin timber.

Q. Well, did it show how many they ran to the acre, or something? [340]

(Testimony of Millard McKinley Barnum.)

A. The private cruise showed 21,000 feet per acre.

Q. 21,000 feet an acre? A. Yes.

Q. What kind of timber?

A. It is about 35 per cent pine and the rest fir and Lodgepole Ponderosa Pine.

Mr. Murray: That is all.

Cross Examination

Q. (By Mr. Helvern) Mr. Barnum, you spoke concerning the condition of the roads in the vicinity of Lake Tahoe at the beginning of your direct testimony.

In what year did you first examine the condition of the roads?

A. In 1923 and practically every year I have been around Lake Tahoe.

Q. In every year after 1923?

A. During my time on the Tahoe Forest until '30 first, and grazing and other activities, acquisition.

Q. What was your knowledge, if any, of those roads prior to 1923?

A. That is the first time I was in that vicinity.

Q. You stated some lands were purchased by you from the Hobart Estate? A. Yes, sir.

Q. I believe you said this was to the north of Truckee? [341]

A. In the vicinity of Hobart Mills town.

Q. That is north of Truckee, is it not?

A. Yes.

Q. About how many miles from Lake Tahoe?

(Testimony of Millard McKinley Barnum.)

A. About 15.

Q. 15. Isn't Truckee 20 miles from Lake Tahoe? A. Not through Brockway.

Q. Not through Brockway? A. No.

Q. Can the lake be seen from any of that land, from Hobart Mills?

A. Some of this Hobart Mills was really much closer; some of it was within four miles of Lake Tahoe.

Q. You spoke about the Government being limited as to the amount of money it could spend in buying lands for reforestation. A. Yes, sir.

Q. And you spoke of values up to \$3.00 per acre. Were you permitted without limit to pay whatever you thought the land was worth for reforestation purposes, or were you limited as to how high you could go?

A. No, not limited. We could pay what we considered it would sell for on the open market.

Q. What was the highest price you ever paid for land for reforestation, or the Government paid under your direction [342] and request?

A. \$125 an acre.

Q. \$125 an acre. What was the highest price you ever paid in the vicinity of Lake Tahoe or Hobart Mills for land for reforestation?

A. \$3.50.

Q. \$3.50? A. Yes, sir.

Q. How long had this land been cut over that you acquired from Hobart Mills?

(Testimony of Millard McKinley Barnum.)

A. Well, I can't give the exact figure.

Q. In your opinion as an expert on Forestry in that particular line?

A. From one to forty years.

Q. Forty years? A. Yes, sir.

Q. And it had large growths of timber on it?

A. Yes; some of it was cut very selectively and had a very good stand. Of course, that isn't the only thing—the timber isn't the only thing that carries a land value.

Q. To be sure. What are the other things?

A. One of them is grazing in that locality.

Q. Grazing, yes. You spoke of certain timber in Section 25, I believe, owned by Carson and Tahoe, or at one time owned by them south of the lake which you designated. [343]

A. Owned by Clover Valley Lumber Company.

Q. Yes. A. Yes, sir.

Q. Would you say that this timber was near merchantable timber?

A. It is under the present market. It was not a few years back. At the time I was on it, it was not merchantable.

Q. You say the present market?

A. There is a very good market, as you know now, because of national defense. That is one thing that makes it a very good market right at the present time.

Q. If it were not for the national defense program would that be merchantable timber now?

(Testimony of Millard McKinley Barnum.)

A. Yes, I believe that particular section would be, yes.

Q. Would it have been in 1935, thinking of timber prices and accessibility of this timber?

A. In 1935? Yes, it would have been.

Q. Would it have been at any time prior to 1935?

A. Yes, sir. At that time there was a sawmill at Myers and this timber was loggable to Myers.

Q. Had that sawmill been there any length of time?

A. Well, it was during the time that I was on the Tahoe Forest it was at Myers.

Q. You don't know how long it had been there?

A. No, I do not. [344]

Q. Under the same conditions would that timber have been merchantable in 1913?

A. Well, they logged around it when they was logging that vicinity and left this particular section.

Q. Would you answer the question then yes, that it would have been merchantable in 1930?

A. Well, I couldn't say because that was before I—

Q. (Interposing) But they did log all around it?

A. Yes, they logged around it.

Q. How far is this section 25 from this mill that you referred to, Myers Mill, I believe, how many miles?

A. From where Myers Mill was, the town of Myers? It is about between 12 and 14 miles.

Q. 12 and 15 miles? A. Yes, sir.

(Testimony of Millard McKinley Barnum.)

Q. How far was this from the lake, this section 25, how many miles?

A. Two and a half. It was near a road, existing road. That is the thing that made it merchantable.

Q. Pardon me?

A. It is adjacent to an existing road, Kingsbury Grade road. You couldn't build a road to the section but it is already there in this particular section.

Q. If it was near a road why wouldn't the timber be logged off?

A. Apparently it was the policy of the then owner not to log [345] it, as far as we can see.

Q. Then, the reason why it was never logged off was because that was the policy of the owner not to log it off?

A. Or else they didn't have a good title. As I say, I don't know why that particular section was left. It was logged around and left.

Q. How far away from Lake Tahoe in the main were the sections of land which you bought from Carson and Tahoe; how many miles from the lake, the Sections that you actually purchased?

A. About four to five miles.

Q. Where you have your finger is about eight miles, isn't it, looking at that as a section?

A. (Examining map) No; this is six miles from here to here (indicating).

Q. Yes.

A. This is a township (indicating).

Q. The bulk of it, would you say, was five miles?

(Testimony of Millard McKinley Barnum.)

A. Yes, sir.

Q. The center? A. No; four to five miles.

Q. Well, the largest red portion is six miles away. That is at the lower edge.

The Member: I think the map will be in evidence. It will speak for itself.

Mr. Helvern: Yes, we will accept that. [346]

That will be all.

Mr. Murray: May I ask him one question?

The Member: All right, sir.

Redirect Examination

Q. (By Mr. Murray) I would like to ask you, Mr. Barnum, why you recommended the purchase by the Government in 1938 of the Carson-Tahoe land that was purchased south of the lake instead of the land that was offered by Carson and Tahoe Company to the Government on the east side of the lake?

A. One thing was topography. The land on the south side of the lake was very good ground, mostly all soil, and you could build a road most anywhere with very little cost. That that they didn't acquire is steep ground and the cost of building roads to get the timber out in the future when you get another crop will be excessive. And also grazing value too, the land on the south was much higher grazing value.

Mr. Helvern: One more question.

Recross Examination

Q. (By Mr. Helvern) When you were thinking

(Testimony of Millard McKinley Barnum.)

of the roads and the condition of the soil you considered that from the status of the Government for reforestation purposes, I presume?

A. Well, that as well as—the way we appraised it is what we considered it worth to an individual, what an individual would pay for it, because we don't buy above the market. [347]

Q. You don't purchase this land for resale, do you, for the Government?

A. We can; we do resell.

Q. You didn't purchase this; you purchased this all for resale rather than reforestation?

A. No.

The Member: The purpose of this was what?

The Witness: The purpose of buying it was reforestation.

Q. (By Mr. Helvern) That takes many years, does it not?

A. Well, immediately you get grazing under permit.

Mr. Helvern: Yes. That is all.

The Member: Is that all?

Mr. Helvern: No further questions.

Mr. Murray: That is all.

The Member: That is all, sir.

Witness excused.

The Member: Call your next.

Mr. Murray: Mr. Barrett.

LOUIS A. BARRETT

a witness on behalf of Respondent, was duly sworn and testified as follows:

The Clerk: State your full name, please.

The Witness: Louis A. Barrett. [348]

The Reporter: Spell it, please.

The Witness: L-o-u-i-s B-a-r-r-e-t-t.

Direct Examination

Q. (By Mr. Murray) Mr. Barrett, are you actively engaged in any occupation right now?

A. No, sir.

Q. What was your last activity in an occupation?

A. In the United States Forest Service.

Q. And where were you located? First, are you retired from that service now? A. I am.

Q. And where was your last location in the Forest Service?

A. In San Francisco.

Q. And what was your title?

A. Assistant Regional Forester.

Q. Did you have charge of any special duties in the Forestry Department?

A. I had charge of all land use, acquisition, exchange and recreation in California and Western Nevada.

Q. What was your occupation in 1912 and '13, Mr. Barrett?

A. The same as when I retired.

Q. You had the same title in 1912 and '13 that you had when you retired?

(Testimony of Louis A. Barrett.)

A. The same title from 1910 to 1936.

Q. And were the duties the same? [349]

A. The same; a few more added every year.

Q. Mr. Barrett, what was your occupation prior to 1910, say, from 1902 to 1910?

A. In 1902 I served as a member of a survey party in the general Land Office, engaged in public land surveys all the way from the Rio Grande in Texas to the boundaries of Yellowstone Park.

Q. And what service was that in?

A. General Land Office Department of the Interior.

Q. You were surveying what type and kinds of lands?

A. Public lands, national park boundaries and military reservations.

Q. And how long were you occupied in that way?

A. One year.

Q. What did your classification consist of?

A. That was more of a survey job although we did make an appraisal of some abandoned military reservations in the southwest with a view to their disposal for the United States.

Q. Well, in 1910 you went into the Forestry Service then, you stated? A. In 1903.

Q. Oh, in 1903 you went into the Forestry Service? A. Yes, sir.

Q. Well, what did you do between 1903 and 1910? [350]

A. 1903 and '4 my work was on boundary inspection all over the west from Arizona, New Mex-

(Testimony of Louis A. Barrett.)

ico, to Montana and Idaho, traveling mainly by saddle horse.

Q. That was 1903 and '4? A. Yes, sir.

Q. And then in 1910 what was your occupation?

A. I was supervisor of three of the large newly created national forests in California taking in from Clover Valley north to Pit River.

Q. Did your services involve the classification of lands at any time?

A. From the start of my work in 1903 to my retirement I had to do with classification work.

Q. Did you ever have to do any appraisal work for the Forestry Service?

A. Yes, I handled personally or checked the land appraisals made in California during the entire period of my service from 1910 to 1936.

Q. Were you ever engaged in appraisal work with respect to lands for any other agencies then the Land Office and the Forestry Service of the United States?

A. Several years prior to my retirement I was called upon as a consulting expert by the Resettlement Administration of the Department of Agriculture, by the Indian Office of the Department of the Interior and by the State Park Commission [351] of California.

Q. You were engaged by the State for some appraisal work, you say, the State of California?

A. I served without compensation in any of these as cooperation on the part of one Government Agency with another.

(Testimony of Louis A. Barrett.)

Q. Well, what class of land and to what extent in acreage was the work that you assisted in for the State of California?

A. Mainly on three parks, one down on Palomar Mountain, one in the San Jacinto Mountains, the third one 40 miles down below Monterey.

Q. Did that involve the actual appraisal of the value of properties? A. It did.

Q. Did your appraisal and classification work that you are speaking of for the Forestry Service include the territory around Lake Tahoe?

A. It did.

Q. When did you first go to Lake Tahoe? When did you make your first trip to Lake Tahoe?

A. In 1911.

Q. Which way did you go?

A. Came in from Nevada City by Truckee on a saddle horse.

Q. What was the condition of the road from Truckee to Lake Tahoe at that time?

A. It was just a fair dirt road. [352]

Q. What was the first point on the lake that you came to?

A. Tahoe Tavern, Tahoe City.

Q. What was the situation at that time with respect to development or anything of that sort?

A. There was quite a material development around the outskirts of the lake as well as the south end down around Tallac and some intermediate large estates between the two, and there was also some at Emerald Bay.

(Testimony of Louis A. Barrett.)

Q. What side of the lake is that on, all those that you are speaking of?

A. They are all on the west or south side of the lake.

Q. In what state? A. In California.

Q. In 1911 did you travel from Tahoe City down to Emerald Bay and to the south side of the lake?

A. I did not.

Q. When was the first time you traveled down that way?

A. In July 1912. The Forest Service had a—their roads didn't extend all around the lake and the Forest Service had a launch that was used for patrol purposes around the lake. That was the only way, by water, of getting entirely around the lake in 1912.

Q. Do I understand that there was not any road from Tahoe City down to Tallac on the California side?

A. There was no road from Meeks Bay to near Tallac. [353]

Q. How long a distance is that, about?

A. Oh, roughly eight, ten miles, eight miles or such a matter.

Q. Do you know when the first road was put through in that stretch?

A. I don't remember exactly but I think about 1920.

Q. Did the Forestry Service have something to do with that? A. No.

(Testimony of Louis A. Barrett.)

Q. When in the early days there around 1912 or '13 did you make any trip to the Nevada side of Lake Tahoe?

A. Not by vehicle or horse in 1912 but I went entirely around the lake close to the shore on the Forest Service launch.

Q. And at that time were you conscious of a place that is now known at Zephyr Cove?

A. I knew—from a study of the map and the country being pointed out to me by the Ranger who was the launch operator, he pointed out all these points and I knew from then on where they were.

Q. What did that look like in 1912 or '13 from the standpoint of any development?

A. The only development that I remember seeing on the east side of the lake near the state line to near where Cal-Neva is now was buildings at two places.

Q. And where were they?

A. At the Marley ranch and around Glenbrook.

[354]

Q. You didn't get off the boat that time?

A. No, we skirted close to the shore all the way around.

Q. Well, did you sometime later make a trip over to the Nevada side by road some way?

A. I did.

Q. When was that?

A. The first time was in 1915.

Q. And how did you get there that time?

A. Went in from Placerville and around by

(Testimony of Louis A. Barrett.)

Cave Rock and over the summit and down to Carson City.

Q. How did you go through that time? How did you get over there?

A. Saddle horse.

Q. What was the condition of the road in the Nevada area, that is, from State Line on the south up to Glenbrook at that time?

A. It was poor.

Q. Was that in 1914? A. It was 1915.

Q. 1915. Well, what development, if any, did you see over there as you came along the road?

A. I saw very little along the road between State Line and until you got in sight of Carson Valley.

Q. When was the next time that you went into that locality? A. 1916. [355]

Q. And how did you go in there then?

A. Went in with a Model T Ford. We went over the Kingsbury Grade, down to Minden and on down to Mono Lake.

Q. Well, how did you approach the lake that time, from where?

A. From the Placerville Road and Myers Station on the south.

Q. Well, how did the road look then that you went over?

A. It was not much better, any better than it was a year before.

Q. Did you have any difficulty getting up there with your model T?

(Testimony of Louis A. Barrett.)

A. We had to pour water in it plenty coming back, I know, coming up Kingsbury Grade because it has pitches of 25 per cent.

Q. Pitches of 25 per cent. What kind of a road was that?

A. It was just a dirt road, no surfacing.

Q. Did you pass any cars on the road?

A. Yes, occasionally we saw a car.

Q. What was your purpose in going in there that time, into that east side of Lake Tahoe?

A. The purpose at that time, that was the first start the Forest Service made looking toward any development of recreation as a definite major use in the National Forests of California.

Q. And you had charge of any recreational development in [356] that area?

A. I did.

Q. Well, what did you do over there, then? What did you do on that trip?

A. Just went through the country sizing it up, looking it over with a view to seeing what—making a plan for prospective development of public camp grounds, resort sites and summer home sites.

Q. Well, was that with a view to the possible purchase by the Forestry Department of some of that land?

A. Well, we knew that in the Lake Tahoe region, at least, we would have to purchase because most of the land around the lake was privately owned.

Q. And did you have in mind seeking land to

(Testimony of Louis A. Barrett.)

purchase for the Forestry Department for recreational purposes at that time?

A. We did on the west side of the lake but not on the east side.

Q. Well, did you actually inquire about prices of the lake land on the California side at about that time?

A. I inquired as to prices beginning with my first visit until my last just to get a general idea as to what land prices were in that Lake Tahoe basin.

Q. Well, what, in general was the result of your investigation as to prices over on the California side reaching out from Tahoe City in 1916? [357]

A. I don't remember any exact figures that I set down at that time, but the prices of the good land along the lake shore were pretty high in some cases.

Q. Now, from your trips on both sides of the lake—up to that time you had had, according to your own account, at least three trips over to the Nevada side—at all times when you came over to the Nevada side had you been on the California side too about the same time? A. Yes, sir.

Q. What was your general impression of the recreational features of the California side of Lake Tahoe as distinguished from the Nevada side?

A. At that time I never gave any consideration to the position of recreation lands on the east side of the lake.

The Member: Why not, Mr. Barrett?

The Witness: Because of the poor accessibility.

(Testimony of Louis A. Barrett.)

The climatic conditions are less favorable on the east side because the prevailing winds are from the west, and there is less precipitation on the east side of the lake, and most of the lands on the east side had been logged over while the high priced lands on the west side of the lake were mainly virgin timber stands. Topography was the other factor, because on the west side of the lake, the northwest and south side flat, or relatively flat land extends back from the lake shore in all but a few cases, or from a quarter [358] of a mile to two, at the south end six or eight miles, while on the east side of the lake there is very little flat land except at two or three places.

The Member: May I interrupt again?

Just a moment ago you said as you recall it, the prices charged for shore property on the California side were pretty high and you used some general term like that. Could you make it a little bit more specific? What do you mean by "high" at that time, if you can answer that, Mr. Witness?

The Witness: Well, in such checks as I made, inquiries as I made it was evident that land—that sales made on the west side of the lake, the waterfront property was selling at some five to ten or more times as much as there was any possibility of selling it on the east side of the lake. Some of the land even in 1916 was relatively high priced.

The Member: That is what I don't understand; I mean, I don't know what you mean by "high priced." Could you give me an idea?

(Testimony of Louis A. Barrett.)

The Witness: Well, even as early as that, as my memory goes, there was some of the best of the land there that was on the west side, mainly around Tallac and near the outlet that was being—it couldn't have been acquired, I don't think, for less than five hundred to a thousand dollars an acre.

Q. (By Mr. Murray) You say that was near Tallac?

A. Around Tallac, near Tallac and around Tahoe City. [359]

Q. Tahoe City? A. And Tahoe Tavern.

Q. When did you make your next trip over to the Nevada side, east side of the lake, after 1916?

A. I made all together between 1911 and 1935 twenty separate trips, twenty trips to Lake Tahoe and, oh, probably twelve of them I visited the east side of the lake.

Q. Did you ever make a trip to the east side of the lake to actually inspect and appraise any land?

A. In August 1925 I took the Assistant Forester from Washington—he was the man that passed on land acquisition matters in Washington—I took him over the Glenbrook-Carson City road.

Q. Was that in 1905, you said?

A. 1925. I took him up on the summit and we spent a few hours hiking out along the summit and taking a few pictures there, looking over the cut-over lands with a view to determining what we would consider would be a fair price to pay for

(Testimony of Louis A. Barrett.)

them in case they could be—in case they were definitely offered to the United States.

Q. Did I understand you to say those were lands up on the Nevada side, back of Glenbrook?

A. Back of Glenbrook and from Glenbrook south towards Kingsbury Grade.

Q. That would be in back of Zephyr Cove too, then? [360] A. Back of Zephyr Cove.

Q. Did you make any report as to your opinion of the value of that land in 1925?

A. Only in memorandum form and talking it over with Mr. Sherman at the time.

Q. What did you decide at that time?

A. We decided if the land could be acquired at around \$1.25 an acre it would be a desirable acquisition from the standpoint of the United States.

Q. That was in 1925?

A. That was in August, 1925.

Q. Well, now, how near to the lake front along that same stretch would you expect to classify land that you would only recommend to the Government at \$1.50 an acre?

A. From a quarter to a half a mile as determined by topography.

Q. Well, where would the quarter mile be? Where would the half mile be?

A. Well, the half mile, or even more, probably, in the case of the little valley back of Glenbrook, but some of the steep—some of the portions like along Cave Rock and sites of that kind it wouldn't be over a quarter of a mile back.

(Testimony of Louis A. Barrett.)

Q. Then, do I understand it correctly that you were classifying in this general classification all lands back of a quarter of a mile at some points on the lake and a half a [361] mile at others?

A. Well, approximately that. We would classify at that price lands to which we could ascribe no recreational value.

Q. That is the way you would divide it?

A. Yes, because in our land appraisal work we consider virgin timber, timber producing possibilities, present grazing value and present or prospective recreation values.

Q. Did you have much to do with inspection and classification of lands on which there was virgin timber still? A. Yes, sir.

Q. Did you ever have to make any reports to the Forestry Department on lands on which there was virgin timber?

A. I made reports, or checked and approved reports of lands of all characters that are found in the mountains of California from the best virgin timber lands to the poorest watershed lands.

Q. Did you at that time in your reports state what you thought the value of these lands were?

A. Which ones?

Q. Well, with timber and those without and so on.

A. We did.

Q. I understood you to say that in 19—what year did you go over Kingsbury Grade with the old model T?

A. The first time, as I remember, was in '16.

(Testimony of Louis A. Barrett.)

Q. 1916? [362] A. Yes, sir.

Q. Well, I show you a map which is in evidence as Respondent's Exhibit K and ask you if you can locate the Kingsbury Grade on this map?

A. (Examining map) It follows in general through the south end, crosses in general the south end of their land.

Q. Of whose land? A. The Carson land.

Q. Well——

A. (Interposing) It is not shown on this map, but that is as I remember it.

Q. Well, can you locate Section 25, Township 13, Range 18?

A. (Examining map) Right here (indicating).

Q. How is it indicated on this map?

A. In black and white cross hatch with "Section 25" in the center.

Q. Yes. Now, if you will notice Kingsbury Grade goes across the corner of that land?

A. Yes, follows up that draw.

Q. Do you remember when you went over that grade that time what the nature of that land was there?

A. I only remember that we passed through some uncut timber lands.

Q. On the Kingsbury grade?

A. On the Kingsbury grade. [363]

The Member: Is that Kingsbury Grade approximately where U. S. 50 now goes?

The Witness: I haven't been over the newest road, your Honor.

(Testimony of Louis A. Barrett.)

Mr. Murray: I can tell you my understanding is that 50 goes over——

The Witness: (Interposing) From Glenbrook.

Mr. Murray: (Continuing) ——from Glenbrook to Carson City further north. The Kingsbury Grade is still unimproved.

The Member: I see.

Mr. Murray: I mean, it is pretty good dirt road. It comes in at the south end of the road from Minden.

The Witness: The Kingsbury grade was one of the oldest roads. The first telegraph line across the United States follows up Kingsbury Grade.

Q. (By Mr. Murray) Have you purchased or had the last word on the purchase of any land for the Forestry Service in this part of the country?

A. In the Tahoe country?

Q. Well, generally speaking first?

A. In the Lake Tahoe country, yes.

Q. Do you know approximately how many acres of land you have had the final word on in this section for the Forestry Service as to purchase?

A. Within 50 miles of the lake I should say not less than 50,000 [364] acres.

Q. 50,000 acres?

A. Yes, none of it right on the lake shore except one little piece.

Q. None of it on the lake shore except one little piece? A. One very moderate piece.

Q. Well, what classifications of lands were in this 50,000 acres that you recommended to purchase?

(Testimony of Louis A. Barrett.)

A. It ran all the way from highly valuable recreation land to land that had no value except for a limited amount of grazing.

Q. When did you first start, I mean, when did you start on the purchase of lands for the Government, the actual purchase of lands?

A. Under the General Land Exchange Act of March 20, 1922, we started immediately thereafter.

Q. Then, this 50,000 acres was purchased from 1922?

A. Up until my retirement in '36.

Q. Yes. Well, now, in and around 1913 did you have any occasion to appraise mountain lands, lands around Lake Tahoe, and to classify them in your appraisal?

A. Well, I had charge of classification but not much appraisal from the acquisition standpoint.

Q. When did the appraisal from the acquisition standpoint start in your experience? [365]

A. Well, the first case we handled was 1917 under a special Act of Congress, down on the Sierra National Forest, but in general on a broad scale it didn't start until 1922.

Q. Well, what kind of land was purchased in 1917?

A. We opened negotiations for an exchange. We were five years acquiring the land because the owner wouldn't sell for what we believed was a fair price.

Q. Did you make, or was there made under your supervision any check of the numbers of people that came into Lake Tahoe during any of the years from 1913 to 1930?

(Testimony of Louis A. Barrett.)

A. Not directly into Lake Tahoe. We didn't scale it down to that fine a point, but commencing in the year 1916 we made an estimate, figures derived from all possible sources of the travel to each national forest in Californai and their mode of conveyance.

Q. Was some such a check as that made of the region involving Lake Tahoe under your direction?

A. The Tahoe National Forest as a whole, yes.

Q. And can you state what some of those comparative figures are from, say—what is the earliest date that you made them?

A. Well, we started in 1916.

Q. Well, could you tell us how those figures read for, say, 1916 and then '20 and '25 and '30, just a few years apart, you know? [366]

A. If I may refer to these figures here which I took off the official records the other day of the Forest Service.

The Member: Yes.

The Witness: The first record we had was 1916 and the estimate of travel to the Tahoe National Forest, the whole area, was 42,000 people. That was by all means of transportation.

Q. (By Mr. Murray) Now, can you break that down into one or two or three classifications? What was the mode of travel?

A. 1916 about 50-50; it was about half by automobile and the other half by train or by team.

Q. Now, can you tell us about 1920, what the number of travelers were?

(Testimony of Louis A. Barrett.)

A. The estimated number of travelers in 1920 had jumped to 90,000, with 72,000 of them by automobile. In 1921 the estimate was 100,000 with 79,000 by automobile, 1928 was 447,000 with 426,000 of them by automobile, and the last figure that I have was for 1938, that I took down, that I jumped to, and this is due to the tremendous cross-country travel, 4,373,000, of whom over four million traveled by automobile. That is an increase of——

The Member: (Interposing) A considerable extent.

Mr. Murray: Yes.

The Witness: (Continuing) ——from 42,000 to 4,473,000 in 22 years. This is from the official records, annual statistical reports and records of the Forest Service. [367]

Mr. Murray: I think that is all, your Honor.

The Member: Any cross examination?

Mr. Helvern: No questions.

The Member: That is all, sir. Thank you very much. [368]

[Endorsed]: U. S. B. T. A. Filed July 8, 1941.

[369]

In the United States Circuit Court of Appeals for
the Ninth Circuit

B. T. A. No. 103735.

CARSON AND TAHOE LUMBER AND FLUM-
ING COMPANY,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review

ORDER RE TRANSMITTAL OF EXHIBITS

Upon consideration of the petitioner's motion and the causes shown in support thereof, and it appearing to the Court that the respondent has no objection to the entering of the order therein moved,

It is by the Court this 15th day of February, 1943,

Ordered: That the originals of the following exhibits, which exhibits are to be specified in the designation of contents of record, need not be printed in the record on review and that the Clerk of the Tax Court of the United States is directed to transmit the originals of the exhibits to the Clerk of this Court to be produced at the argument of this cause for the benefit of the Court and counsel: Petitioner's Exhibits 1, 2, 3, 8, 9, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23; Respondent's Exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, AA and BB.

It Is Further Ordered: That said exhibits remain

in the custody of the Clerk of the Tax Court of the United States until fifteen days before this cause on review is set for argument in this Court and then, upon direction and cost of counsel for petitioner on review, that said exhibits be transmitted to the Clerk of this Court, and [399]

It Is Further Ordered: That the Clerk of this Court transmit a certified copy of this order to the Clerk of the Tax Court of the United States, to be by him incorporated in the record on review as transmitted to this Court.

By the Court.

FRANCIS A. GARRECHT,
Circuit Judge.

[Endorsed]: Filed Feb. 15, 1943. Paul P. O'Brien, Clerk.

A True Copy:

Attest: Feb. 15, 1943.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk.

[Endorsed]: T. C. U. C. Filed Feb. 20, 1943.
[400]

[Title of Tax Court and Cause.]

PRAECIPE

To the Clerk of the Tax Court of the United States:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of

Appeals for the Ninth Circuit copies, duly certified as correct, of the following documents and records in the above entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Ninth Circuit heretofore filed by the above named petitioner.

1. Docket entries of all proceedings before the Tax Court of the United States (formerly United States Board of Tax Appeals) in Docket No. 103735.

2. Pleadings before the Tax Court of the United States in Docket No. 103735, including:

(a) Petition with copy of notice of deficiency attached.

(b) Answer filed by respondent.

(c) Amended answer filed by respondent.

(d) Reply filed by petitioner. [401]

3. Memorandum Findings of Fact and Opinion of the Tax Court of the United States entered June 23, 1942.

4. Decision of the Tax Court of the United States entered September 1, 1942.

5. Petition for review and notice of filing thereof.

6. Order of the United States Circuit Court of Appeals for the Ninth Circuit dated December 31, 1942, extending the time for the completion and transmission of the record on review to and including March 7, 1943.

7. Typewritten copy of the Reporter's Official Report of Proceedings before the Tax Court of the United States, reporting the testimony taken at the hearings in San Francisco, California on June 25 and June 26, 1941 (2 volumes, 318 pages).

8. Petitioner's Exhibits 4, 5, 6, 7, 10, 11 and 15.

9. Order of the United States Circuit Court of Appeals for the Ninth Circuit, dated February 15, 1943, ordering and directing that the following exhibits need not be printed in the record on review and that they be transmitted to the Clerk of the Court upon direction and cost of counsel for petitioner on review fifteen days before the cause on review is set for argument: Petitioner's Exhibits 1, 2, 3, 8, 9, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23; Respondent's Exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, AA and BB.

10. The following exhibits to be transmitted to the United States Circuit Court of Appeals pursuant to the Court's order [402] described in the foregoing paragraph: Petitioner's Exhibits 1, 2, 3, 8, 9, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23; Respondent's Exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, AA and BB.

11. This praecipe.

Respectfully submitted,

LLEWELLYN A. LUCE,

937 Munsey Building,

Washington, D. C.

GEORGE H. KOSTER,

300 Montgomery Street,

San Francisco, California.

Counsel for Petitioner on
Review.

Service of copy of within praecipe is hereby acknowledged this 24th day of February, 1943. No counter praecipe will be filed.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue,
Counsel for Respondent on
Review.

[Endorsed] T. C. U. S. Filed Feb. 24, 1943.

[403]

[Title of Tax Court and Cause.]

CERTIFICATE OF CLERK

I, B. D. Gamble, clerk of The Tax Court of the United States, do hereby certify that the foregoing pages, 1 to 403, inclusive, contain and are a true copy of the transcript of record papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 27th day of February, 1943.

[Seal] B. D. GAMBLE,
Clerk.

[Endorsed]: No. 10380. United States Circuit Court of Appeals for the Ninth Circuit. Carson and Tahoe Lumber and Fluming Co., a corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the Tax Court of the United States.

Filed March 3, 1943.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 10380

CARSON AND TAHOE LUMBER AND FLUM-
ING COMPANY,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

STATEMENT OF POINTS TO BE RELIED
UPON ON APPEAL AND DESIGNATION
OF PORTION OF RECORD TO BE
PRINTED

Comes now the petitioner above named by its attorneys of record and complying with the rules of

this Court states that it intends to rely on appeal on all and each of the errors assigned in the Petition for Review herein, which Petition for Review is included in the transcript herein, and petitioner hereby formally adopts the errors assigned in said Petitioner for Review as its Statement of Points to be Relied Upon on Appeal.

Petitioner further states that it relies upon the entire record certified by the Clerk of the Tax Court of the United States except the portions thereof designated below. Petitioner requests that there be printed as the record on appeal herein all of the record certified to this Court except the following portions thereof:

Page 48—Cover page of Transcript of Testimony.

Pages 50 & 51—Index of Transcript of Testimony.

Page 52, line 10 to page 56, line 17 inclusive—Opening statements of counsel.

Page 135, line 1 to page 136 line 8 inclusive—Discussion of counsel.

Page 139 line 16 to page 141 line 9 inclusive—Discussion of counsel.

Page 191 line 3 to page 192 line 1 inclusive—Discussion of counsel.

Pages 235, 236, 237 and line 1 to 7 inclusive on page 238—Title and Index of Transcript of Testimony.

Page 274 line 15 to page 275 line 7 inclusive—Discussion of counsel.

Page 320 line 17 to page 321 line 11 inclusive—Discussion of counsel.

Page 368 line 5 to line 26 inclusive and page 369—Discussion of counsel.

Page 370—Petitioner's Exhibit 4.

Page 372 and line 20 to 36 inclusive on page 373—Petitioner's Exhibit 5, line 20 to 36, page 2 and 3.

Respectfully submitted,

GEORGE H. KOSTER

BAYLEY KOHLMEIER

300 Montgomery Street

San Francisco, California

LLEWELLYN A. LUCE

937 Munsey Building

Washington, D. C.

Counsel for Petitioner

[Endorsed]: Filed May 14, 1943. Paul P. O'Brien, Clerk.

No. 10,380

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

2

CARSON AND TAHOE LUMBER AND FLUM-
ING Co. (a corporation),

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S OPENING BRIEF.

GEORGE H. KOSTER,

BAYLEY KOHLMEIER,

300 Montgomery Street, San Francisco, California,

Attorneys for Petitioner.

L. A. LUCE,

Washington, D. C.,

Of Counsel.

FILED

JUL 31 1943

PAUL P. O'BRIEN,

CLERK

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No. 10,380

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CARSON AND TAHOE LUMBER AND FLUM-
ING Co. (a corporation),

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S OPENING BRIEF.

JURISDICTIONAL STATEMENT.

This is an appeal from a decision of The Tax Court of the United States (formerly the United States Board of Tax Appeals) in which a deficiency in income tax was determined against Petitioner for the year 1938. The findings of fact and opinion below were rendered in memorandum form and are set forth in full in the record herein (R. 25-38).

Petitioner is a Nevada corporation and has its principal place of business in Carson City, Nevada (R. 5). Petitioner's income tax return for the year 1938 was duly filed with the Collector of Internal Revenue for the District of Nevada (R. 26). Respondent determined a deficiency in Petitioner's income tax for the

year 1938 in the amount of \$4844.10 and on April 11, 1940, pursuant to Section 272 of the Internal Revenue Code, Respondent sent to Petitioner a notice of said deficiency (R. 11). On July 8, 1940, pursuant to Section 272 of the Internal Revenue Code, Petitioner filed its appeal from said deficiency determination and alleged therein that it had overpaid its income taxes for the year 1938 by the amount of \$1254.45 (R. 5-15). On August 19, 1940, Respondent filed his answer to said petition denying the claims of Petitioner (R. 15-17). On March 17, 1941 Respondent filed an amended answer claiming an increased deficiency in income taxes for the year 1938 in amount of \$17,963.61 (R. 17-22). On April 14, 1941 Petitioner filed its reply to amended answer denying the allegations in the amended answer (R. 22-25). The appeal was called for hearing on June 25, 1941 and evidence documentary and oral was introduced by both parties. On September 1, 1942 decision was entered determining a deficiency in Petitioner's income tax for the year 1938 in the amount of \$15,488.61 (R. 38).

On November 27, 1942, under authority of Section 1141 of the Internal Revenue Code (Title 26, United States Code, Section 1141, as amended by Section 504 of the Revenue Act of 1942), Petitioner filed its petition for review by this Court of said decision of the Tax Court of the United States (R. 39). This appeal and the transcript of record herein were duly filed and docketed in this Court on March 3, 1943 (R. 358).

STATEMENT OF THE CASE.

The deficiency in income tax determined by Respondent which was the cause of this action resulted from an increase in gain reported by Petitioner from the sale of 11,187 acres of land in 1938. The additional gain determined by Respondent resulted from his determination that the property sold by Petitioner had a lesser fair market value on March 1, 1913 than the value as of that date used by Petitioner in computing its taxable gain from the sale. The issue presented to the Court below was the determination of the fair market value on March 1, 1913, of the property in question.

Petitioner was organized in 1873 and acquired many thousands of acres of land in Nevada and California on and near Lake Tahoe (R. 26). Petitioner carried on a lumber and milling business until 1896 when most of its merchantable timber had been removed and its lumbering operations were discontinued (R. 27). Thereafter to and including 1938 Petitioner was engaged primarily in disposing of its lands.

In 1938 Petitioner sold 11,187 acres of land in Douglas County, Nevada and on or near the eastern shore of Lake Tahoe. Said land and the improvements thereon were sold for \$300,433.27. Petitioner had owned the land sold before March 1, 1913. Petitioner reported said sale in its income tax return for 1938 and reported a gain of \$114,991.02. In computing said gain Petitioner reported a fair market value as of March 1, 1913 of the property sold in the amount

of \$185,442.25. Said \$185,442.25 included improvements at a cost or value of \$30,428.25 and land at \$155,014.00. There has been no dispute with regard to the cost or value of the improvements (R. 26).

Upon auditing Petitioner's return Respondent reduced the March 1, 1913 value of the land by \$15,501.85 and increased the gain by a like amount (R. 26). As the result of said adjustment and others not here in controversy Respondent determined a deficiency for the year 1938 of \$4844.10 (R. 12).

In its petition for the redetermination of said deficiency Petitioner alleged that the March 1, 1913 value of the land sold in 1938 was \$192,217.36 and alleged that it had overpaid its income tax for the year 1938 by the amount of \$1254.45 (R. 10).

In his amended answer, which was filed shortly before the hearing below, Respondent alleged that the March 1, 1913 value of the land sold by Petitioner in 1938 was not in excess of \$60,000.00 and asked for a determination of an increased deficiency in tax in the amount of \$17,963.61 (R. 21, 22).

The land in question consisted of 11,187 acres situated in Douglas County, Nevada on or near the southeastern shore of Lake Tahoe. Maps and other exhibits introduced in evidence show the location of the land by township, range and section and also show that the land included considerable lake frontage and extended back from the lake approximately 3 miles in most places and in one place approximately 5 miles (Petitioner's Exhibit 17).

The testimony of witnesses who were familiar with the land established that it included at least one harbor, sandy beaches, rocky banks, precipitous cliffs, meadow lands, grazing lands, timber lands which had been cut over but had second growth timber. The evidence shows that the land involved included considerable shore frontage but the record contains no evidence from which it can be determined how much of the shore frontage is sandy beach, how much is rock or how much is precipitous. Neither is there any evidence in the record with regard to the contour of the back land. There is no evidence in the record from which it can be determined how many acres can be considered as water front land, how many acres can be considered as meadow or grazing land, or how many acres can be considered as timber land.

Both parties called witnesses and introduced documentary evidence. Petitioner's witness W. S. Bliss testified that in 1912 he appraised all the land of Petitioner (44,000 acres), including the land in question, and the values placed upon the land in 1912 were put in evidence (R. 77). Both parties introduced evidence of sales and appraisals of land in the vicinity of Lake Tahoe over the period from 1901 to 1936. Sales prices varied from \$1.25 per acre to \$1500.00 per acre (R. 30-31).

In its findings of fact the Tax Court reviewed and summarized the evidence and listed certain of the sales and appraisals established by the evidence (R. 26-36). The Tax Court then stated at the conclusion of its findings,

“The fair market value of the 11,187 acres of land here in question, as of March 1, 1913, exclusive of improvements, was \$75,000.” (R. 36.)

The Tax Court gave no indication in either its findings or its opinion with regard to how the value of \$75,000.00 was determined.

On the basis of its finding that the March 1, 1913 fair market value of the land sold was \$75,000.00 the Court entered its decision determining a deficiency in income tax for the year 1938 in the amount of \$15,488.61.

This appeal is from said decision.

SUMMARY OF ARGUMENT AND CONTENTIONS.

In support of its appeal, Petitioner contends:

(1) There is nothing in the findings of fact or opinion of the Tax Court which supports a determination of a March 1, 1913 value of \$75,000.00 for the property sold by Petitioner in 1938.

(2) The March 1, 1913 value found by the Tax Court is not supported by any evidence and is purely arbitrary.

(3) The evidence establishes the March 1, 1913 value used by Petitioner in its income tax return.

(4) Since in his amended answer, Respondent repudiated the value determined in the deficiency notice and undertook to establish a lesser value he thereby assumed the burden of proof to establish the March

1, 1913 value of the property sold and the taxable gain realized by Petitioner.

(5) Respondent failed to prove the value of the property on March 1, 1913 and did not produce any evidence from which a fair market value for the property could be determined.

(a) Not one of Respondent's witnesses expressed an opinion with regard to the March 1, 1913 value of the property in question.

(b) There was no description of the land involved or of other lands sold from which the Tax Court could make a comparison and determine the value of the land.

(6) As Respondent repudiated the deficiency notice and the value used therein and failed to prove any other value, there is nothing in the record from which the Tax Court could determine *any deficiency* in tax.

(7) In any event there was no evidence in the record from which the Tax Court could determine a deficiency greater than that set forth in the deficiency notice.

(8) The finding of value by the Tax Court was purely arbitrary, is not based upon or supported by any evidence and is erroneous as a matter of law.

SPECIFICATIONS OF ERROR.

In making and rendering its decision, as aforesaid, The Tax Court of the United States committed the following errors upon which your Petitioner relies as a basis for this proceeding:

The Tax Court of the United States erred:

(1) In determining a deficiency in Petitioner's income tax for the calendar year 1938 in the amount of \$15,488.61.

(2) In failing to determine that there was no deficiency in income tax due from Petitioner for the year 1938 and that the Petitioner had overpaid its Federal income tax for 1938 by the sum of at least \$1254.75.

(3) In finding that the fair market value as of March 1, 1913 of the 11,187 acres of land sold by Petitioner in 1938 was \$75,000.00, in that said finding is not supported by any evidence and is contrary to the only competent evidence of value in the record.

(4) In failing to find that the fair market value as of March 1, 1913 of the 11,187 acres of land sold by Petitioner in 1938 was not less than \$155,014.00 as reported by Petitioner in its income tax return for 1938 as the only competent evidence of value in the record requires such finding.

(5) In finding that the acreage aforesaid had a fair market value of \$75,000.00 as of March 1, 1913 without setting forth any reasons for determining such a value of \$75,000.00 or showing by any computation, data or detail how such a figure was reached

or determined. The said valuation of \$75,000.00 as found by the Tax Court was not in accord with the determination of Respondent in his notice of deficiency, nor with the figure claimed by Respondent in his amended answer, nor with the March 1, 1913 value as shown by Petitioner in its 1938 return, nor with the value claimed by Petitioner before the Tax Court.

(6) In any event, the Tax Court erred by finding a lower value as of March 1, 1913 for the said acreage than the value of \$139,512.15 determined by Respondent in his notice of deficiency dated April 11, 1940. There was no evidence adduced at the trial which would substantiate a fair market value as of March 1, 1913 of less than \$139,512.15 for the said acreage as found by the Respondent in the notice of deficiency upon which his *prima facie* case was based.

(7) In failing to make a complete and sufficient findings of fact showing how the figure of \$75,000.00 was determined to be the fair market value as of March 1, 1913 of the acreage sold in 1938.

(8) In disregarding the un rebutted evidence of Petitioner and reaching an independent conclusion of its own that the acreage in question had a fair market value of \$75,000.00 on March 1, 1913.

(9) In not redetermining the deficiencies in favor of Petitioner and against the Respondent.

ARGUMENT.**I. INTRODUCTORY STATEMENT.**

The controversy between the parties hereto concerns the amount of the taxable gain realized by Petitioner upon the sale in 1938 of 11,187 acres of its property and the improvements thereon. Under the law (Revenue Act of 1938, Section 111) the taxable gain was the excess of the amount realized over the adjusted basis as provided in Section 113 of the Revenue Act of 1938. As the property in question was acquired prior to 1913 the basis to be used in computing the gain was the cost or the fair market value of the property as of March 1, 1913 whichever was higher (Revenue Act of 1938, Section 113(a)(14)).

Since the parties were in agreement with regard to the price (\$300,433.27) received by Petitioner upon the sale of its property in 1938 and with regard to the cost basis of the improvements sold (\$30,428.25) (R. 19), and since it was not contended that the cost of the land to Petitioner exceeded the fair market value thereof on March 1, 1913 the only issue presented to the Tax Court was the March 1, 1913 value of the land sold (R. 26).

In its income tax return for the year 1938 Petitioner reported a March 1, 1913 value for the land of \$155,014.00 and a taxable gain on the sale of \$114,991.02 (R. 26). In determining the deficiency which gave rise to this action Respondent determined that the fair market value of the land on March 1, 1913 was \$139,512.15 and that the taxable gain realized was \$130,492.87 (R. 14). In its petition to the Tax Court

Petitioner alleged that the March 1, 1913 fair market value of the land was \$192,217.36 (R. 10). In his amended answer Respondent alleged that the March 1, 1913 fair market value of the land was \$60,000.00, and that the taxable gain realized was \$210,005.02 instead of \$130,492.87 shown in the deficiency notice (R. 21). The Tax Court found that the March 1, 1913 fair market value of the land was \$75,000.00 (R. 36). On the basis of the value found the Tax Court rendered and entered its decision for an increased deficiency in tax.

Petitioner's contention in this appeal is that the March 1, 1913 value found by the Tax Court is not supported by substantial evidence and is purely arbitrary and contrary to the evidence herein. Petitioner further contends that the evidence conclusively supports the value used by Petitioner in its income tax return, that Respondent had the burden of proof and failed to prove the March 1, 1913 value of the property and that therefore there was no evidence or basis upon which the Tax Court could determine either an increased deficiency or any deficiency at all on this issue.

**(a) Finding of value must be supported
by substantial evidence.**

While the question of value is an issue of fact and a finding of value by a trial Court will not be reviewed by an Appellate Court to determine whether the finding is supported by the weight of evidence, it is well settled that whether a finding of value is supported by substantial evidence is a question of law

which will be reviewed by an Appellate Court. This Court and other Courts of appeal have many times reversed the decisions of the Board of Tax Appeals and District Courts where it appeared that the lower Court made a finding of value which was not supported by substantial evidence.

- Helvering v. Rankin* (1935), 295 U.S. 123, 55 S. Ct. 732;
- Belridge Oil Company v. Commissioner* (9 Cir. 1936), 85 F. (2d) 762;
- Tex-Penn Oil Co. v. Commissioner* (3 Cir. 1936), 83 F. (2d) 518; affirmed 300 U.S. 481;
- Buena Vista Land & Development Co. v. Lucas* (9 Cir. 1930), 41 F. (2d) 131;
- Citrus Soap Company of California v. Lucas* (9 Cir. 1930), 42 F. (2d) 372;
- Royal Packing Company v. Commissioner* (9 Cir. 1927), 22 F. (2d) 536;
- Toledo Grain & Milling Co. v. Commissioner* (6 Cir. 1932), 62 F. (2d) 171;
- Helvering v. Kendrick Coal & Dock Company* (8 Cir. 1934), 72 F. (2d) 330;
- Nachod & U. S. Signal Co. v. Helvering* (6 Cir. 1934), 74 F. (2d) 164;
- Planters Operating Company v. Commissioner* (8 Cir. 1932), 55 F. (2d) 583;
- Boggs and Buhl v. Commissioner* (3 Cir. 1929), 34 F. (2d) 859;
- Chicago Railway Equipment Co. v. Blair* (7 Cir. 1927), 20 F. (2d) 10;
- Washburn v. Commissioner* (8 Cir. 1931), 51 F. (2d) 949;

Dempster etc. Company v. Burnet (Ct. App. D. C.), 46 F. (2d) 604;

Conrad and Company v. Commissioner (1 Cir. 1931), 50 F. (2d) 576;

Pittsburgh Hotels Company v. Commissioner (3 Cir. 1930), 43 F. (2d) 345.

The above decisions establish the principle that a finding of fact such as value will not be disturbed on appeal if it is supported by substantial evidence but such finding must be based upon the evidence in the case and must not be arbitrary and unreasonable. While a finding of value is in most cases necessarily a "guess", it cannot be an arbitrary guess. It must be a reasonable guess which finds support in the evidence.

Andrews v. Commissioner (2 Cir. 1943), 135 F. (2d) 314.

(b) Burden of proof was on respondent.

Unlike most tax cases in which the burden of proof rests with the taxpayer, in the present case, the burden of proof was on the Respondent. In his amended answer Respondent repudiated and abandoned the March 1, 1913 value determined in the deficiency notice and alleged and undertook to establish a much lower value than had been used in determining the deficiency assessment. In so doing the Respondent assumed the burden of proof with regard to March 1, 1913 value and the amount of taxable gain realized by Petitioner upon the sale of its property.

Tex-Penn Oil Co. v. Commissioner (3 Cir. 1936), 83 F. (2d) 518;

Hull v. Commissioner (4 Cir. 1937), 87 F. (2d) 260;

Rule 32, Rules of Practice before the United States Board of Tax Appeals;

Henderson Tire & Rubber Co. v. Commissioner, 12 B.T.A. 716.

The value found by the Tax Court herein is considerably less than the value used by Petitioner in its return and the value used by Respondent in the deficiency notice, and is greater than the value alleged by Respondent in his amended answer. The value found by the Tax Court must therefore find its support solely in the evidence and can derive no support or benefit from the ordinary presumption of correctness which attaches to the determination of the Commissioner.

II. ANALYSIS OF FINDINGS AND OPINION OF TAX COURT.

In its findings of fact the Tax Court summarized a substantial portion of the evidence, but it made no finding and set forth no evidence which would indicate or support the \$75,000.00 value found by the Court.

After stating the various values claimed by the parties and briefly summarizing the history of Petitioner and its property holdings, the Court made certain findings with regard to the physical conditions which prevailed on the Nevada side of Lake Tahoe in 1912 and 1913 (R. 27). The Court found that the Nevada side of Lake Tahoe was not as desirable for recreational purposes as the California side and that in 1916 waterfront property on the California side

was selling for five to ten times as much as that on the east side of the lake (R. 28). The Court found that in 1912 Petitioner gave an option for the purchase of 44,403 acres of land for \$778,500.00 which option was to run for five years under certain conditions. The option was cancelled in 1913 because no purchase had been made (R. 28-29). The prices named in the option were those that Petitioner's president, W. S. Bliss, felt would be realized over a period of five years from 1912. There was a financial depression in 1913 and there was little demand for Petitioner's property from 1913 to 1920 (R. 29).

The Tax Court set forth a list of sales of property on the east side of Lake Tahoe from 1903 to 1923 and the prices paid, which prices varied from \$1.25 per acre to \$1500.00 per acre (R. 30). The Court set forth the appraisals in 1910 and 1921 of properties in the Estate of Duane Leroy Bliss and Elizabeth T. Bliss (R. 31).

The Court discussed the capital stock tax and income tax returns of Petitioner for several different years which declared values for the lands and the stock of Petitioner which, when converted to an acreage basis, showed values per acre of \$1.35 to \$3.00 (R. 32-33).

The Court pointed out that on January 29, 1918, the trustees of Petitioner by resolution fixed the March 1, 1913 values of all its property (44,000 acres) at \$260,000.00 (R. 34-35).

The Court discussed the assessed values of Petitioner's property which were used for county tax pur-

poses (R. 35). In 1935 Frank Murphy, a trustee and vice-president of Petitioner, offered to the United States Forestry Service the back lands in Douglas County, Nevada for \$3.00 per acre, and the shore lands exclusive of Zephyr Cove for \$10.00 per acre. In 1938 the Forestry Service, having checked the lands offered, purchased 2240 acres of back lands owned by Petitioner in California, south of the lake for \$3.00 per acre (R. 36).

Having stated the above facts and without analysis or discussion, the Court then stated: "The fair market value of the 11,187 acres of land here in question, as of March 1, 1913, exclusive of improvements was \$75,000.00" (R. 36).

In its opinion the Court merely stated that it had considered all the evidence but had derived little help from sales on the California side of the lake or from sales more than ten years before or more than ten years after 1913 (R. 37).

Petitioner submits that there is absolutely nothing in the findings or the opinion of the Court which gives any support to the finding that the March 1, 1913 fair market value of the 11,187 acres was \$75,000.00. The Tax Court gives no inkling of the method or formula which it used to reach the value determined. The value found does not approximate any value claimed by either of the parties. No witness testified to any such value. Reduced to an acreage value the value found equals an average value of approximately \$6.70 per acre. There were six sales at prices varying between \$4.28 per acre and \$10.00 per acre but the

findings show that the locations of three of the six properties sold was unknown and the other three were from one-half mile to one and three-quarter miles from the lake (R. 30). During the same period there were three sales at \$500, \$764.59 and \$1500.00 per acre (R. 30). The findings indicate that the shore land was more valuable than the back land (R. 28), but there is nothing in the findings or opinion to indicate that the Court made any distinction between shore land and back land. There is nothing in the findings or opinion to indicate that the Court employed any method to reach the value found. A value of \$25,000.00 or \$200,000.00 would find as much support in the findings and opinion as \$75,000.00.

In this connection it should be noted that the Court had under consideration 11,187 acres of land which the record shows included various classes of land varying from sandy beach land to precipitous cliffs and mountain lands several miles from the lake. The findings do not state what portion of the land was considered as shoreland and what portion was considered back land. The sales listed in the findings were made from 1903 to 1923 and varied in size from 2 acres to 1634 acres. Many of the sales were of unknown location. The shore front sales varied from \$1.25 an acre to \$1500.00 an acre. It is obvious that all of said sales cannot be considered sales of comparable lands. The Court gives no indication with regard to which of the sales were considered comparable or which of the sales, if any, were considered in reaching the value of \$75,000.00. It would take a

nebulous formula indeed to determine the value of the lands in question from the sales listed. The Tax Court is required to state the evidence or facts upon which it bases its finding of value.

Tex-Penn Oil Co. v. Commissioner (3 Cir. 1936), 83 F. (2d) 518.

Petitioner respectfully submits that the value of \$75,000.00 determined by the Court was purely arbitrary and is not supported by any of the facts stated in the findings.

III. THE VALUE FOUND BY THE TAX COURT IS NOT SUPPORTED BY ANY EVIDENCE.

(a) Summary of evidence.

The evidence in this case both oral and documentary is voluminous and much of it seems rather far afield from the issue involved. Petitioner will attempt to summarize as briefly as possible the portions of the evidence which it believes might be considered pertinent.

Testimony of W. S. Bliss.

Mr. Bliss, who was called as a witness by Petitioner, was 76 years of age and had spent almost all of his life around Lake Tahoe. He was educated in civil and mining engineering and was a licensed real estate operator (R. 50-51). In 1907 Mr. Bliss succeeded his father as manager of Petitioner. In 1910 he became president and held that position until 1928 (R. 51). He did logging and engineering for Petitioner and built the Truckee and Tahoe Railroad (R. 53).

He was unquestionably familiar with the lands of Petitioner and with land in general in the vicinity of Tahoe.

In April 1912 Bliss and Petitioner entered into a contract whereby Bliss was authorized to sell the property of Petitioner (Petitioner's Ex. 6, R. 67). At the same time an option to be exercised over a period of five years was granted by Petitioner through Bliss to Brewster, Edwards and Wooster, a real estate firm in San Francisco, for the purchase of Petitioner's property (44,403 acres) for a total price of \$778,500.00 (Petitioner's Ex. 7, R. 76). The land was classified into blocks and a price was fixed for each block (R. 77). Petitioner's Exhibit 8 shows the location of the various blocks.

Bliss testified that he went over the land in 1912 and fixed the values set forth in the option agreement (R. 61). The values fixed were the prices for which Bliss thought the property could be sold over a period of five years (R. 62). He spent considerable time making the appraisal and considered the appraisal correct at the time it was made (R. 107-108). The purpose of the appraisal was to determine the minimum amount for which the land could be sold (R. 62).

No property was sold under this option. At the expiration of the first year Mr. Wooster asked for an extension stating as his reason for his failure to sell the property that it was a presidential year which caused a general financial depression and conservatism in business (R. 84). The option was extended for one month and then cancelled (R. 87).

Mr. Bliss testified with regard to several sales of property which he had appraised (R. 112-117). He also testified that he had a disagreement with the other trustees of Petitioner, particularly Mr. Murphy, with regard to the prices for which Petitioner's properties should be sold. The disagreement culminated in a lawsuit which was settled by Bliss surrendering his interest in the company for certain property (R. 119-120).

On cross-examination Bliss testified that he valued the land by putting a certain value on the shore per foot, a certain value on acres for building sites and a lower value on back land and that the prices fixed were what he thought the property could be sold for (R. 127-128). No attempt will be made to summarize the remainder of the cross-examination of Mr. Bliss (R. 126-171) as it is difficult to determine what portions thereof are pertinent and summarization might distort the purport of the testimony.

On redirect examination Bliss testified that in 1912 the property was covered with a wonderful growth of second growth timber, some of which was fifty years old (R. 172), and that land with second growth timber was much more valuable than cut-over land (R. 172).

Testimony of Mr. Harry O. Comstock.

Mr. Comstock, who was called as a witness by Petitioner, was 67 years old and had lived most of his life at Lake Tahoe. He owned the Hotel Brockway at the north end of the lake and had been in the hotel business at the lake for many years (R. 177). He

and his father had operated a hotel at Tallac on the south end of the lake for 36 years (R. 178). He had also known Mr. Bliss most of his life. He had dealt extensively in real estate and testified with regard to a number of sales and purchases which he had made on and around Lake Tahoe (R. 178-188).

His testimony showed that he was familiar with most of the land owned by Petitioner and he testified that in his opinion the 1912 appraisal of Bliss was very conservative at the time it was made (R. 199).

On cross-examination he testified that the Nevada lands which he purchased or sold were all near the California line and that except for two acres he never owned any property in Douglas County, Nevada (R. 214-215). His valuation of land on the Nevada side of Lake Tahoe was based upon what he thought it ought to be in view of what happened in California (R. 219). In his opinion the Nevada side of the lake was just as desirable as the California side (R. 215). The earlier development of the California side of the lake was not due to better accessibility but rather that that side just happened to be developed first (R. 193).

Testimony of Arnold M. Weber.

Captain Weber, who was formerly an associate forester in the El Dorado Forest, carried on negotiations in 1935 for the purchase of land from Petitioner; 7790 acres in California south of Lake Tahoe were purchased *in 1938* for \$3 per acre (R. 206). (This land was four or five miles from the lake (R. 332).) Mr. Murphy, vice-president of Petitioner, offered all the land of Petitioner except Zephyr Cove

for \$3.00 per acre for back land and \$10 per acre for shore land (R. 208). Weber considered the land purchased more desirable than the other land offered (R. 209).

Weber did not consider himself competent to judge land prior to 1926 (R. 211).

Testimony of Joseph W. Hall.

Mr. Hall testified to certain purchases and sales which he made on the Nevada side of Lake Tahoe in 1901 and 1903 and in the 1920's (R. 249-253). He testified that there wasn't much activity in real estate until the 1920's (R. 254). He had known the Nevada side of Lake Tahoe since 1901 but had been in the real estate business only since 1920 (R. 249).

Testimony of William D. Park.

Mr. Park, the sheriff and assessor of Douglas County, Nevada, testified from the county records that the lands of Petitioner in Douglas County were assessed at \$1.25 per acre in 1912 without classification (R. 281-282). Mr. Park became assessor in 1923 (R. 283). He had been a blacksmith prior to 1923 (R. 287), and did not know anything about land at Tahoe (R. 283). After Park became assessor he classified property and increased the assessed values (R. 283-284). Park had no real estate experience but was helped by a Mr. Fulstone who was not called as a witness and whose knowledge of real estate values does not appear in the evidence (R. 286). The assessed value of Petitioner's land in 1937 was approximately double the assessed value in 1913 (R. 293).

Testimony of Millard McKinley Barnum.

Mr. Barnum was a senior forester of the Forest Service and testified with regard to land purchases in the Tahoe region by the Forest Service (R. 320-328). He went to Tahoe for the first time *in 1923* (R. 317). The land which was purchased from Petitioner in 1938 was 4 or 5 miles from the lake (R. 332), but was good ground and better for grazing than the offered land which was not purchased (R. 333). The purpose of the purchase was for reforestation (R. 334).

Testimony of Louis A. Barrett.

Mr. Barrett was assistant regional forester. He first went to Tahoe in 1911 and made several trips thereafter. In 1915 he made a trip there to look for recreational land. He gave no consideration to the Nevada side of the lake because of poor accessibility, less favorable climatic conditions and the lands had been logged over (R. 343-344). He stated that land on the California side of the lake sold for five to ten times as much as that on the Nevada side and that in 1916 some of the land on the California side couldn't be had for less than \$500.00 to \$1000.00 per acre (R. 344-345).

In 1925 he spent a few hours hiking along the summit on the east side of the lake back of Glenbrook and Zephyr Cove with a view to determining what he would consider a fair price to pay if the land was offered to the United States (R. 345-346). He decided that if the land could be acquired for \$1.25 per acre it would be a desirable acquisition from the standpoint

of the United States (R. 346). The land he so classified was from a quarter of a mile to a half mile or more back from the lake (R. 346).

Testimony of Mrs. Fred Allerman.

Mrs. Allerman testified that she was born in Glenbrook, Nevada and had spent most of her life around Tahoe (R. 264). Her father had owned Marley Ranch which was about a mile south of Zephyr Cove on the lake front. There were 152 to 160 acres in the ranch (R. 266). In 1911 her father bought the property adjoining the ranch known as Round Mountain for \$200 (R. 268). She didn't know how many acres were in the Round Mountain property but that property and the Marley Ranch took in all the lake frontage of Marla Bay (R. 267-268).

Testimony of Joseph Allen McFaul.

Mr. McFaul had lived at Tahoe most of his life and worked at cutting cord wood (R. 269-271). He was at Marla Bay until 1913 and remembered that the roads were just ordinary dirt roads (R. 272).

Testimony of Hans R. Jepsen.

Mr. Jepsen was county clerk and treasurer of Douglas County, Nevada and had been for 19 years (R. 273). He produced the probate records of the Estate of Duane Leroy Bliss, deceased, and Elizabeth T. Bliss, deceased. He made the appraisal in the Estate of Elizabeth T. Bliss in 1921 (R. 276). He had worked for the Forest Service before he became county clerk in 1923 and had handled the collection of grazing

fees (R. 229). He had no definite knowledge of sales of land and wasn't interested in any sales (R. 279).

Testimony of William H. Smith.

Mr. Smith was associate highway engineer for the United States and had charge of the improvements on the Nevada side of Lake Tahoe *from 1929 to 1935* (R. 305). He described the condition of the roads in 1930 and testified with regard to traffic counts which were made from 1931 to 1940 (R. 306-309).

Mr. John T. Boyle identified certain records which showed a sale of land by a Mrs. Beatty *in 1921* (R. 258).

Mr. James B. Howell was the representative of Mr. Whittell, who purchased Petitioner's land in 1938. He testified that he dealt with Mr. Murphy and with Mr. McLeod and that Whittell also purchased the property known as Skyland for \$60,000.00 in 1938 (R. 259-263).

Mr. C. C. Griggs, a technical advisor with the Bureau of Internal Revenue, testified that he had prepared one of the maps (Respondent's Ex. L) which was put in evidence and that he had taken certain photographs, shortly before trial, which were put in evidence. He also testified with regard to the present condition of the timber on a certain section of land (R. 299).

There was other evidence in the form of exhibits including maps, tax returns, and minutes of meetings of Petitioner's trustees and stockholders, but none of the documentary evidence affirmatively establishes the

value of the 11,187 acres of land here in question. Most of the documentary evidence was introduced as a basis for testimony of witnesses.

The above is not intended to be a comprehensive summary of all of the evidence. It is merely a summary of the portions of the testimony which Petitioner believes might be considered pertinent. Much of the evidence is too indefinite to summarize and a great deal of the evidence is so remote that it seems to have little, if any, bearing upon the March 1, 1913 value of the property involved. If Petitioner has omitted any material evidence Respondent will no doubt call such evidence to the attention of the Court.

(b) Analysis of the evidence.

Before considering the evidence introduced Petitioner desires to call attention again to the fact that the issue before the Tax Court was the determination of the fair market value as of March 1, 1913 of 11,187 acres of land on and near Lake Tahoe. Maps were introduced which showed the location of the land in question by township, range and section. Maps also show the location of other properties sold (Exhibits 8, 17, 18, K and L). The maps also show that the land included considerable lake frontage and extended back several miles from the lake. The evidence discloses that the lake frontage included at least one harbor, sandy beaches, rocky beaches and precipitous cliffs and that the land which could be considered as shore land varied in depth from a quarter of a mile to more than a half mile. There is no evidence in the

record which shows what portions of the land could be properly included in any of the above classifications.

The evidence also discloses that most of the land had been cut over but was covered with second growth timber varying in age up to fifty years. The property also included meadows and grazing land. There is no evidence in the record from which the back land can be properly classified.

It is also clear from the record that shore frontage varied in value depending upon its character as between harbor, sandy beach, rocky beach and precipitous cliffs. The value of back land also varied in accordance to its contour, the timber growth, suitability for grazing and proximity to the lake.

Petitioner submits that it would be impossible for anyone to place anything but an arbitrary value upon 11,187 acres of land which included so many different types and classifications of property of widely varying values without knowing at least approximately how many acres should be included in the various classifications. There is nothing in the record which indicates that the Judge of the Tax Court had any independent knowledge of the property involved and statements made during the trial indicate that he was not familiar with the property or the general vicinity of the property. As there was no evidence in the record from which the property could be classified it is submitted that the value determined by the Tax Court was necessarily an arbitrary value. It is to be noted that while all of the witnesses who knew the land and

had any qualifications whatsoever considered the land as including several different types of property of widely varying values, the Tax Court in its findings and opinion made no attempt to classify the property but merely found that the entire property had a fair market value in 1913 of \$75,000.00.

Neither was the finding of value based upon the opinion of any qualified expert for the only witnesses who expressed opinions with regard to 1913 value of the property were W. S. Bliss and Harry O. Comstock. Respondent's witnesses testified to sales and appraisals of various parcels of land on and around the lake but not one of them expressed an opinion with regard to the fair market value of the land in question as of March 1, 1913 or any other date. The nearest approach to an opinion by any of Respondent's witnesses was the statement of the witnesses in the Forestry Service that in *1935 or 1938* they considered the land which they purchased from Petitioner for \$3.00 per acre more valuable for their purposes, namely, reforestation, than the portion of the land involved which was offered to them by Mr. Murphy. The offer referred to admittedly did not include Zephyr Cove, the most valuable portion of the property here in question. Mr. Barrett also testified that in 1925 he spent a few hours hiking over the property and determined that if the land could be acquired for \$1.25 per acre it would be a desirable acquisition from the standpoint of the United States (R. 346). It is quite apparent that neither of the above statements was intended as an expression of opinion as to the value of the property in question in 1913.

It must also be obvious that since the Petitioner sold the remainder of its property, 11,187 acres, in 1938 for over \$300,000.00, the \$3.00 per acre price mentioned as the price paid *in 1938* for some of Petitioner's property could not possibly have been any indication of the value of the remaining 11,187 acres.

The sales of land which were shown by the evidence do not establish the value of Petitioner's land or furnish a basis for the determination of such value. The sales listed in the findings (R. 30) cover a period of twenty years and the sales not listed were even more remote. The prices paid varied from \$1.25 per acre to \$1500.00 per acre. No comparison was made between the lands sold and Petitioner's land.

Sales of comparable property are acceptable as evidence of value in most jurisdictions but it must appear that the other properties sold were comparable to that to be valued.

118 A. L. R. 869, 876;

20 *American Jurisprudence* 342;

Brand v. Commissioner, 5 B. T. A. 297.

The mere fact that the property is in the same general vicinity does not establish that the properties are comparable particularly where the vicinity includes many different classifications of land of widely varying value. Also in order to be entitled to consideration the sales of comparable properties should be near the valuation date. Furthermore, in the present case the prices at which the various sales were made covered such a broad range that no reasonable pattern or formula of value could be devised there-

from. It is respectfully submitted that the evidence in this case with regard to sales of other properties is too incomplete to furnish any basis for the valuation of the 11,187 acres in question.

The evidence also included appraisals made in 1910 and 1921, in connection with the administration of the estates of two decedents, of lands near Glenbrook, and Zephyr Cove. There is no evidence as to who made the appraisal in 1910 or the basis thereof. The testimony of Hans R. Jepsen, who made the appraisal in 1921, shows clearly that he had no real knowledge of land values and no qualifications to place a fair appraisal on land particularly in 1921 (R. 278-279). An appraisal, even in connection with the administration of an estate is nothing more than the opinion of the person who makes it. If the appraiser is not qualified or if he is unknown the appraisal is not entitled to any consideration.

The appraisals do not qualify as the opinion of an expert witness because there is nothing in the evidence which shows that the persons who made them were qualified to give an acceptable opinion. Even the approval thereof by the Probate Court would not make the appraisals acceptable as competent evidence of fair market value. *Carrick v. Commissioner*, 21 B. T. A. 12. The appraisals have no apparent connection with the value found by the Tax Court and it is submitted that they cannot be considered as substantial evidence supporting the value found.

The evidence also shows that Petitioner made varying statements and representations in its income and

capital stock tax returns and in its books and minutes with regard to the average value per acre of its land and the total value of all its lands. The testimony of Mr. Bliss (R. 132-133), and Mr. Bigelow (R. 234) show that the values used were arbitrary and did not represent a fair appraisal of land values. Furthermore, there is no evidence to show what portion of the values declared should be allocated to the land here in question. Such evidence falls far short of the affirmative proof required to establish the fair market value of property.

See

Appeal of Kilburn Machine Co., 2 B. T. A. 363;
Appeal of Pennsylvania Match Co., 4 B. T. A.
 944.

Again there is no apparent relation between the represented values in the returns and the values found by the Tax Court and it is submitted that such discredited representations could not constitute affirmative proof of land values.

There was also considerable testimony with regard to the condition of the roads and the accessibility of the property. The Tax Court found that the road was poor and that the property was not easily accessible (R. 27). That conclusion was apparently based primarily upon the testimony of Mr. Smith, who surveyed the property for the new road about 1930 (R. 305). Mr. Smith first went to Lake Tahoe in 1930 (R. 305), and it is apparent from his testimony that he was comparing the old road with roads as they are constructed today.

In this connection it should be noted that the witnesses who traveled the road in 1913 considered it to be a fair road at that time (Bliss (R. 162), Comstock (R. 218), McFaul (R. 272)). The road was used by the stage in the early days and later by automobiles. The road from Truckee to Tahoe City was no better than the road from Carson City to Tallac (R. 218-219).

IV. THE EVIDENCE SUPPORTS PETITIONER'S VALUATION.

As stated above, the only witnesses who were thoroughly familiar with the land in 1913 who expressed opinions with regard to the 1913 value of the 11,187 acres in question were W. S. Bliss and Harry O. Comstock. There can be no doubt with regard to their qualification as experts. The appraisal upon which the opinion of Mr. Bliss was based was made in 1912, shortly before the basic date and before the enactment of the income tax law. The appraisal was made after a thorough examination of the property in which consideration was given to the various types of land included and the effect of shore frontage, and was made for the purpose of determining the prices which could be realized for the property over a period of five years, a period which was certainly not unduly long for the sale of over 44,000 acres of land. The appraisal was used as the basis for an option granted to a real estate firm for the purchase of the property. While no purchases were made under the option the optionee was sufficiently interested to seek an extension. Financial depression and business conservatism

were given by the optionee as the reasons for his failure to make sales.

Mr. Comstock, who was also thoroughly familiar with land around Tahoe, including the land in question, long before 1913 and who made many purchases and sales of land around 1913, stated that the appraisal made by Mr. Bliss in 1912 was conservative at the time it was made (R. 199).

The appraisal made by Mr. Bliss and his testimony, corroborated by Mr. Comstock, is the only evidence in the record which definitely pertains to the March 1, 1913 value of the 11,187 acres in question. Mr. Bliss did not describe the land but the evidence shows that he knew the land and took into consideration the nature of the land and the effect of shore frontage in fixing the value which he placed thereon. Mr. Comstock's testimony also shows that he was thoroughly familiar with the land in question and with lands in general around Lake Tahoe (R. 198). He had been talking land with Mr. Bliss for 30 years. He had gone over the maps of Mr. Bliss in years past and had always considered that Mr. Bliss was most conservative in the values he placed on the land (R. 198).

Subsequent sales did not all bring the price at which Mr. Bliss had appraised the property but he explained that he was under pressure from the stockholders to raise money and the sale of land was his only means of raising money (R. 112).

The testimony of Mr. Bliss was not as definite in many respects as it might have been but it should be remembered that at the time of trial he was 76 years

of age and was being questioned about events which happened twenty and thirty years ago. The appraisal which he made was not retrospective but was actually made in 1912 in the light of conditions as they then existed.

No clear explanation was given with regard to the declarations and representations of value in the tax returns but here again it must be remembered that those returns were made when the income and capital stock tax laws were comparatively new and not well understood. Also, the returns were made during and shortly following war years when business and land values were still more or less disturbed from the war.

No other witness testified to a different value for the land in question except Comstock who gave higher values to some of the lands (R. 193-197), and there is no evidence in the record which establishes that the Bliss appraisal was not fairly and honestly made and entitled to consideration in determining the March 1, 1913 value of Petitioner's land.

It is apparent from the findings of the Tax Court that little or no consideration was given to the appraisal and opinion of Mr. Bliss. The rule is now well established by decisions of this Court and other Courts of Appeal that while the Tax Court is not necessarily bound by opinions of experts, expert testimony as to valuation of property cannot be disregarded by the Tax Court where there is no other evidence and the Court has no knowledge of its own with regard to the value of the property.

Belbridge Oil Co. v. Commissioner (9 Cir. 1936),

85 F. (2d) 762;

- Citrus Soap Co. v. Lucas* (9 Cir. 1930), 42 F. (2d) 372;
Boggs & Buhl, Inc. v. Commissioner (3 Cir. 1929), 34 F. (2d) 859;
Planters Operating Co. v. Commissioner (8 Cir. 1932), 55 F. (2d) 583;
Chicago Railway Equip. Co. v. Blair (7 Cir. 1927), 20 F. (2d) 10;
Bryant, et al. v. Commissioner (2 Cir. 1935), 76 F. (2d) 103;
Tex-Penn Oil Co. v. Commisioner (3 Cir. 1936), 83 F. (2d) 518.

It is respectfully submitted that as the value fixed by Mr. Bliss and corroborated by Mr. Comstock was the only evidence before the Tax Court with regard to the March 1, 1913 value of the land in question, and as there is no evidence in the record to support any other value, it was reversible error for the Court to refuse to accept the appraisal of Mr. Bliss as establishing the value of the land.

V. THE TAX COURT ERRED AS A MATTER OF LAW IN FINDING A MARCH 1, 1913 VALUE LESS THAN THE VALUE ESTABLISHED BY THE APPRAISAL OF MR. BLISS.

As stated above, Petitioner believes that it established that the March 1, 1913 value of its property was at least as great as the value used in its income tax return. But even assuming that the Tax Court was justified in concluding otherwise, there was still no basis, evidence or authority upon which the Court could justify a value other than that established by the

appraisal of Mr. Bliss and claimed by the Petitioner in its tax return.

If the appraisal and opinion of Mr. Bliss and the testimony of Mr. Comstock are disregarded, there is then no evidence whatsoever in the entire record upon which a finding of a value as of March 1, 1913 for the 11,187 acres of land in question could be based. No other witness expressed an opinion with regard to the value of said land as of 1913 or any other date. There is no evidence in the record from which a comparison can be made between the other lands sold and the 11,187 acres to be valued. There is nothing in the record to indicate that the judge of the Tax Court had any knowledge upon which he could base an independent finding of value. The Tax Court has no authority to make an arbitrary finding of value not supported by any evidence.

The Tax Court is a fact finding body and is required to find the facts of the case when competent evidence is presented upon which a finding can be based. But the Court is not required or permitted to find facts which are not supported by the evidence.

Belridge Oil Co. v. Commissioner (9 Cir. 1936),
85 F. (2d) 762;

Tex-Penn Oil Co. v. Commissioner (3 Cir. 1936),
83 F. (2d) 518;

Andrews v. Commissioner (2 Cir. 1943), 135 F.
(2d) 314.

When the parties fail to produce evidence from which a finding can be made and the Tax Court has no independent knowledge upon which it can base a

finding, any finding of fact would necessarily be arbitrary and unreasonable and beyond the power of the Court.

The findings of fact and opinion of the Tax Court in this case clearly show that the finding of a value of \$75,000.00 was wholly arbitrary. The Court points to no evidence and sets forth no method of reasoning as being relied upon or followed or which could have been relied upon or followed to determine the value found. The mere statement in the opinion that all the evidence was considered does not make the finding any the less arbitrary especially since there is no evidence in the record which supports such a value. This failure of the Court to set forth the evidence or other basis upon which it determined the value found is in itself sufficient grounds for reversal of the decision.

Tex-Penn Oil Co. v. Commissioner (3 Cir. 1936),
83 F. (2d) 518;

Andrews v. Commissioner (2 Cir. 1943), 135 F.
(2d) 314.

It is respectfully submitted that the finding of a value of \$75,000.00 for Petitioner's land as of March 1, 1913 was purely arbitrary and that there is no evidence in the record to support that finding or any other value except one based upon the appraisal of Mr. Bliss. If the Court was justified in refusing to accept the appraisal of Mr. Bliss it should have refused to make any finding of value for failure of proof.

VI. THE TAX COURT ERRED AS A MATTER OF LAW IN DETERMINING A DEFICIENCY GREATER THAN THAT SET FORTH IN THE DEFICIENCY NOTICE.

It is not the function of the Tax Court to assess additional taxes but to redetermine deficiencies proposed by the Commissioner (Internal Revenue Code, Section 272(a)(1)). The Tax Court has no power to determine an increased deficiency unless a claim is properly made therefor by the Commissioner (Internal Revenue Code, Section 272(e)). Furthermore, if an additional deficiency is affirmatively claimed by the Commissioner, he assumes the burden of proof and the Tax Court has no power to increase the deficiency unless the Commissioner establishes his claim by affirmative evidence.

Moise v. Burnet (9 Cir. 1931), 52 F. (2d) 1071;

Pittman v. Commissioner, 24 B. T. A. 244;

Monroe Sand & Gravel Co. v. Commissioner, 36 B. T. A. 747.

If the Commissioner fails to carry the burden of proof with regard to his claim for an increased deficiency by failing to establish his claim by affirmative evidence, the Tax Court has no authority to increase the deficiency originally proposed and a decision for a greater deficiency would be erroneous as matter of law. See:

Cascade Milling & Elevator Co. v. Commissioner, 25 B. T. A. 946;

Terminal Railroad Association v. Commissioner, 33 B. T. A. 906;

Commissioner v. Fifth Avenue Bank (3 Cir. 1936), 84 F. (2d) 787;

Rines Real Estate Co. v. Commissioner, 12 B. T. A. 1370;

Falck v. Commissioner, 26 B. T. A. 1359.

The burden of proof assumed by the Commissioner in such cases is the same as that ordinarily imposed upon the taxpayer who challenges a proposed deficiency and he must establish his contentions by a preponderance of evidence.

Terminal Railroad Association v. Commissioner, 33 B. T. A. 906.

In the present case the additional tax proposed in the deficiency notice was \$4844.10 (R. 12). The March 1, 1913 value for the land in question used by the Commissioner in said deficiency notice was \$139,512.15 (R. 14). In his amended answer the Commissioner asked for an increased deficiency in the amount of \$17,936.61 based upon the contention that the March 1, 1913 value of the land did not exceed \$60,000.00 (R. 17-22). The Tax Court found a March 1, 1913 value of \$75,000.00 (R. 36) and determined a deficiency of \$15,488.61 (R. 39).

Since, as has been pointed out in this brief, no evidence was presented upon which a finding of a value less than that used by Petitioner could be based, Respondent failed to sustain the burden of proof which he assumed and the Tax Court had no authority to increase the deficiency originally proposed by Respondent. The decision of the Tax Court is in effect a finding that Respondent affirmatively established by competent evidence that the fair market value of the property in question was \$75,000.00 on March 1, 1913,

which finding would not be supported by any evidence; or it is an arbitrary assessment of an additional deficiency by the Tax Court, which would also be erroneous because beyond the statutory powers of the Court.

It is respectfully submitted that the decision of the Tax Court for a deficiency in excess of that proposed in the original deficiency notice is erroneous as a matter of law.

VII. THERE WAS NO BASIS UPON WHICH THE TAX COURT COULD DETERMINE ANY DEFICIENCY IN THIS CASE.

In the present case Respondent not only alleged and asked for an increased deficiency but he also expressly repudiated the March 1, 1913 value determined in the deficiency notice and admitted that the value previously determined was erroneous (R. 18). A determination of value in a deficiency notice is ordinarily presumed to be correct until overcome by substantial evidence. But it is doubted that the Commissioner can expressly repudiate such a determination and admit that it is erroneous in order to claim an increased deficiency and still rely upon it to sustain the deficiency originally proposed in the event that he fails to sustain the burden of proof which he voluntarily assumes when he undertakes to establish the lesser value alleged and the additional deficiency claimed.

Where the Commissioner abandons a determination in the deficiency notice and alleges new claims with regard thereto which, if proved, would result in an additional deficiency, it would seem that his position

would be the same as though the abandoned determination had not been included in the deficiency notice but had been affirmatively claimed by the Commissioner in its revised form in his answer. The situation is the same as though the abandoned determination were stricken from the deficiency notice. If the Commissioner fails in his proof and is unable to or does not produce evidence upon which a finding of value can be based and thereby fails to show that any gain was realized by the taxpayer he fails to sustain the burden which he assumed to establish that a deficiency in tax is due from the taxpayer. If no additional income or deficiency in tax is established by the evidence there is nothing before the Tax Court upon which it can base a determination that any deficiency is due.

In *Tex-Penn Oil Co. v. Commissioner* (3 Cir. 1936), 83 F. (2d) 518, affirmed without comment on this point in 300 U. S. 481, the Circuit Court stated (p. 524):

“The formal notices of deficiency contained in the letter of the commissioner were abandoned and repudiated by the Commissioner himself. The burden thereafter rested upon him *to establish that a capital gain occurred and the amount of it.*
* * *” (Italics supplied.)

After further discussion of the facts the Circuit Court again stated (p. 525):

“The burden in these cases rested upon the commissioner to establish by competent evidence that the taxpayers realized a capital gain and the amount thereof. He has failed to do so.

“A tax with deficiencies and interest of over \$9,100,000 seems indefensible on any theory. The

transaction was not taxable and a judgment of no deficiency is to be entered by the Board of Tax Appeals.”

In *Hull v. Commissioner* (4 Cir. 1937), 87 F. (2d) 260, 261, the Court stated:

“When the matter came before the Board of Tax Appeals, the respondent filed an amended answer setting up new and different grounds for the determination of a deficiency against the taxpayer from those set out in the original notice of deficiency. As provided by rule 30 of the Rules of Practice of the United States Board of Tax Appeals, under these circumstances, the burden of proof rests upon the Commissioner to prove his contention. The formal notices of deficiency contained in the letters of the Commissioner were abandoned and the burden thereafter rested upon him to establish the allegations of his amended answer. *Tex-Penn Oil Company v. Commissioner* (C.C.A.), 83 F. (2d) 518. See, also, *Helvering v. Taylor*, 293 U. S. 507, 55 S. Ct. 287, 79 L. Ed. 623.”

The above decisions indicate that if the Commissioner abandons the determinations in the deficiency notice in order to claim a greater deficiency he also abandons the benefit of the presumption in favor of the correctness of the proposed deficiency and assumes the burden and the risk of establishing by competent evidence not only that an additional deficiency is due but also that any deficiency is due.

In the present case respondent clearly abandoned his determination of value in the deficiency notice and

for the reasons set forth in this brief it is submitted that he failed to prove any value for the property or any gain upon the sale thereof. If, as the above cited authorities seem to hold, there is no longer any presumption that the deficiency notice is correct in so far as this issue is concerned, there is no evidence in the record upon which the Tax Court could determine any gain from the sale of the property in question or any deficiency in tax resulting from such a gain. Since the Commissioner assumed the burden of proof and failed the decision should be in favor of the taxpayer.

In the present case, if the issue with regard to the additional gain from the sale of Petitioner's property had been omitted from the deficiency notice and had been raised by Respondent in his answer, and Respondent failed to prove the facts upon which a gain greater than that reported by Petitioner in its return could be computed, the Tax Court would be required to decide the issue in favor of Petitioner for failure of proof.

Estate of Irving Lee Stone v. Commissioner, 26 B. T. A. 1;

Falek v. Commissioner, 26 B. T. A. 1359;

Iten Biscuit Co. v. Commissioner, 25 B. T. A. 870;

Crider Brothers Commission Co. v. Commissioner, 10 B. T. A. 338.

Petitioner submits that the same rule is applicable here. The determinations in the deficiency notice with regard to the 1913 value of Petitioner's property and the gain realized upon the sale thereof were effectively

stricken therefrom by Respondent's repudiation and abandonment. Respondent having failed in his proof, the Tax Court was without basis or authority to determine what gain if any was realized or to make any change in the gain reported by Petitioner.

In any event Respondent clearly failed to sustain the burden of proof with regard to an increased deficiency and the Tax Court erred in arbitrarily determining a deficiency in excess of that originally proposed in the deficiency notice.

CONCLUSION.

Petitioner respectfully submits:

1. The only evidence in the record of the value of the 11,187 acres of land as of March 1, 1913 is the appraisal and opinion of W. S. Bliss and the testimony of Mr. Comstock.

2. The Tax Court erred as a matter of law in disregarding the appraisal and opinion of W. S. Bliss and the opinion of Mr. Comstock.

3. The finding of the Tax Court that the March 1, 1913 value of the said 11,187 acres of land was \$75,000.00 was arbitrary and not supported by any evidence.

4. In abandoning the determination of value in the deficiency notice the Commissioner also abandoned the presumption in favor of the correctness of the deficiency proposed and assumed

the burden of proving not only the additional deficiency claimed but that any deficiency was due.

5. Respondent failed to produce any evidence from which the March 1, 1913 value of the 11,187 acres could be determined and therefore failed to sustain his burden of proof.

6. Since Respondent failed to prove the amount of the gain realized by Petitioner the Tax Court erred as a matter of law in determining any deficiency in tax as the result of the sale of said land.

7. In any event there was no basis for a determination of a deficiency greater than that proposed in the deficiency notice and the Tax Court erred as a matter of law in rendering a decision for an increased deficiency.

Petitioner respectfully submits that the decision of the Tax Court should be reversed with directions to enter a decision for Petitioner.

Dated, San Francisco, California,

July 30, 1943.

Respectfully submitted,

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Of Counsel.



No. 10380

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

**CARSON AND TAHOE LUMBER AND FLUMING Co., A CORPORATION,
PETITIONER**

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**ON PETITION FOR REVIEW OF THE DECISION OF THE
UNITED STATES BOARD OF TAX APPEALS**

BRIEF FOR THE RESPONDENT

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FILED

SEP 15 1943

**PAUL P. O'BRIEN,
CLERK**

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10380

CARSON AND TAHOE LUMBER AND FLUMING Co., A CORPORATION,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE
UNITED STATES BOARD OF TAX APPEALS*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The only previous opinion in this case is the unreported memorandum findings of fact and opinion of the Board of Tax Appeals which is printed in the record at pages 25 to 38, inclusive.

JURISDICTION

This proceeding involves a deficiency in federal income tax asserted against Carson and Tahoe Lumber and Fluming Company for the taxable year 1938. On April 11, 1940, the Commissioner of Internal Revenue mailed a statutory notice of deficiency to Carson and Tahoe Lumber and Fluming Company (hereafter sometimes called the taxpayer), pursuant to Section 272 of the Revenue Act of 1938, c. 289, 52 Stat. 447, proposing to assess a deficiency in income tax against it for the taxable year 1938 in the sum of \$4,844.10. (R. 11-15.) On July 8,

1940, the taxpayer filed with the Board of Tax Appeals, pursuant to Section 272 of the 1938 Act, a petition for redetermination of its income tax liability for the year involved. R. 1, 5-15.) The Commissioner of Internal Revenue thereafter filed an amended answer to the taxpayer's petition in which he prayed that the deficiency asserted by him for 1938 be increased by the Board of Tax Appeals to \$17,963.61. (R. 17-22.) The proceeding was heard by the Board of Tax Appeals in due course, and after hearing and consideration the Board, on September 1, 1942, entered its decision redetermining a deficiency in the taxpayer's 1938 income tax liability in the sum of \$15,-488.61. (R. 38-39.) On November 27, 1942, the taxpayer filed with The Tax Court of the United States (formerly the United States Board of Tax Appeals) a petition, pursuant to Sections 1141 and 1142 of the Internal Revenue Code, for review by this Court of the decision entered by the Board of Tax Appeals. (R. 39-47.)

As of October 22, 1942, by Section 504 of the Revenue Act of 1942, c. 619, 56 Stat. 798, the name of the Board of Tax Appeals was changed to The Tax Court of the United States. Although the decision of the Board in this case was entered prior to that date, since the record on review was prepared subsequent thereto by the Clerk of that tribunal he captioned it "Upon Petition to Review a Decision of the Tax Court of the United States."

QUESTION PRESENTED

Whether the finding of the Board of Tax Appeals that 11,187 acres of land sold by the taxpayer in the year 1938 had a fair market value of \$75,000 on March 1, 1913, is supported by the evidence.

STATUTE INVOLVED

Revenue Act of 1938, c. 289, 52 Stat. 447:

SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF GAIN OR LOSS.

(a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113 (b) for determining gain, and the

loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) *Amount Realized*.—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

(c) *Recognition of Gain or Loss*.—In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this title, shall be determined under the provisions of section 112.

* * * * *

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General Rule*.—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

* * * * *

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property*.—The basis of property shall be the cost of such property; except that—

* * * * *

(14) *Property acquired before March 1, 1913*.—In the case of property acquired before March 1, 1913, if the basis otherwise determined under this subsection, adjusted (for the period prior to March 1, 1913) as provided in subsection (b), is less than the fair market value of the property as of March 1, 1913, then the basis for determining gain shall be such fair market value. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date.

* * * * *

STATEMENT

This is an appeal from a decision of the United States Board of Tax Appeals (now The Tax Court of the United States) holding that the taxpayer is liable for \$15,488.61 additional federal income tax for the year 1938. (R. 38-39.) The only question involved is the amount of gain which the taxpayer realized in that year upon the sale of 11,187 acres of land, and this in turn depends upon a determination of the fair market value of the land in question on March 1, 1913. (R. 26, 44-46.)

The land in question is located along or near the eastern shore of Lake Tahoe, Douglas County, Nevada. It was sold, together with improvements, for a total consideration of \$300,433.27 (which included \$433.27 for unexpired insurance). In reporting the sale in its 1938 income tax return the taxpayer used a March 1, 1913, value of \$185,442.25, which included improvements costing \$30,428.25 which are not in dispute. (R. 26.) In auditing the taxpayer's return the Commissioner of Internal Revenue reduced the March 1, 1913, value of the land by \$15,501.85 which, with other adjustments not in dispute, resulted in the determination of a deficiency of \$4,844.10. (R. 11-15, 26.) Before the case was tried the Commissioner filed an amended answer with the Board of Tax Appeals in which he affirmatively alleged that the March 1, 1913, value of the land sold by the taxpayer in 1938 was not in excess of \$60,000 and prayed that the deficiency be therefore increased to \$17,963.61. (R. 17-22.)

The case was submitted to the Board of Tax Appeals on a voluminous record consisting of the testimony of a number of witnesses produced by each party plus numerous documents introduced as exhibits.¹ In its findings of fact (R. 26-36) the Board reviewed the evidence in some detail and on the basis of all of the evidence the Board found as an ultimate fact that the land sold by the taxpayer in 1938 had a fair market value of \$75,000 on March 1, 1913 (R. 36). On the basis of this finding, the Board entered its decision redetermining a deficiency in tax of \$15,488.61 for the year 1938. (R. 38-39.)

¹ Many of the documentary exhibits were, by order of this Circuit (R. 353-354), omitted from the printed record on review, but the originals are to be on file with this Court when the case is argued.

The taxpayer, a corporation, was organized in 1873 and exchanged its capital stock for certain timber lands located in the States of Nevada and California on and near Lake Tahoe. It carried on a lumber and sawmill business until about 1896, when practically all of the merchantable timber had been removed from its lands and the lumbering operations were discontinued. After 1898 land was the only asset the corporation had. In 1907 the capitalization of the corporation was reduced from \$2,080,000 to \$260,000. (R. 26-27.)

In 1912 and 1913 the taxpayer owned approximately 44,000 acres of land in Nevada and California, all of it around Lake Tahoe, with about 75,000 shore feet on the lake. Nearly all of the land lying on the Nevada side had lake frontage. The land sold in 1938 which is involved in this proceeding was all located on the east side of Lake Tahoe in the State of Nevada.² (R. 27.)

In 1913 there was very little development on the Nevada side of Lake Tahoe. There was no road of any kind from Glenbrook, Nevada, north to the California line until 1926, when the United States Forestry Service put in a narrow road. The road from the Nevada state line on the South northwards to Glenbrook, by way of Zephr Cove, was poor. In 1912 and 1913 it was of sand and gravel, suitable only for horse-drawn vehicles. Even in 1928 it was rough, wide enough only for one vehicle, and had sharp curves and poor distance visibility. The Nevada side of the lake was therefore not easily accessible in 1913. A railroad had been extended to Tahoe City on the California side of the lake in 1902 or 1903, and development near there was fairly well advanced by 1912, although at that time the railroad was narrow gauged. (R. 27.)

² The location of the lands owned by the taxpayer in 1912 and 1913 is shown in detail in taxpayer's Exhibit 8. The acreage and shore feet of the several tracts designated by numbers 1 to 22, inclusive, on Exhibit 8 are tabulated in the record at page 77. The dates of disposition of all lands disposed of from these several tracts, including the acreage involved in this controversy sold to George Whittell in 1938, and the consideration received for such lands as were sold, are shown in taxpayer's Exhibit 15. (R. 100-105.) The location of the lands sold to George Whittell in 1938 is shown in taxpayer's Exhibit 17 and respondent's Exhibit "L".

The topography of the Nevada side of Lake Tahoe was not as well suited for recreational purposes as that on the California side. The northwest and south sides of the lake, which are in California, have relatively flat land extending back from the lake shore in all but a few cases from a quarter of a mile to two miles, and at the south end from six to eight miles. The east, or Nevada, side of the lake has very little flat land except at two or three places. The climatic conditions are less favorable on the east side because of prevailing winds from the West and there is less precipitation on the east side. (R. 28.)

The Board found from the evidence that that portion of the taxpayer's land on the Nevada side of Lake Tahoe, which adjoined the lake, cannot be said to have had any special value in 1913 because of its lake frontage, except as far as a half mile back from the lake in most portions and three-quarters of a mile in a few. (R. 28.)

The Board also found from the evidence that about 1916 waterfront property on the west, or California, side of Lake Tahoe near Tahoe City was selling for from five to ten times as much as that on the east side of the lake. (R. 28.)

In 1912 the taxpayer gave an option to J. B. Brewster, L. B. Edwards and C. M. Wooster to purchase 44,403 acres of land belonging to it and to El Dorado Wood and Flume Company for a total price of \$778,500. The option agreement was to last for five years but only on condition that the holders of the option would purchase 10 per cent of the property the first year, 20 per cent the second, 20 per cent the third, 20 per cent the fourth, and 30 per cent the fifth. At the end of the first year no purchases had been made pursuant to the option and the holders thereof asked for an extension of the time. The taxpayer in 1913 extended it for one month, but no purchases having been made, it was cancelled. The prices named in the option agreement represented those which W. S. Bliss, its then president, felt in 1912 would be realized over a period of five years. In 1913 there was a financial depression throughout the country and a consequent reluctance on the part of people having money to make new commitments or investments. In that year and until 1920 there was little demand for the property of the taxpayer. Property values began to

climb slowly until 1920 and after that year more rapidly. (R. 28-29.)

This option agreement was executed because of the desire of the stockholders and trustees of the taxpayer to liquidate its property which was producing hardly enough income to pay its expenses. After the cancellation of the option certain stockholders urged the sale of property so that some distribution could be made to them. Few sales were made, however, and dissension arose between Bliss and the other officers and trustees. The latter believed that Bliss' ideas concerning the values of the taxpayer's lands were exaggerated, while Bliss believed that the prices at which the other officers were proposing to sell the land were too low. Finally, in 1928, after some litigation, Bliss resigned as an officer and trustee of the taxpayer and surrendered his stock in return for the conveyance to him of certain property. (R. 29.)³

During the period from 1903 to 1923 several sales were made of property located on the east, or Nevada, side of Lake Tahoe. The details of these sales are set out in the Board's findings. (R. 29-30.) The findings show that, with a few exceptions involving sales of small tracts of shore property, the price at which these sales were made was comparatively low.

The record also contains evidence of a number of sales of property in the State of California located on the south, west, and northwest sides of Lake Tahoe, over a period of some thirty-five years. However, the Board made no findings with respect to these sales, explaining in its opinion that it limited its findings to the sales on the east side of the lake because it felt that on account of the difference in conditions outlined in its findings of fact the sales of property on the west side of the lake were of little help in ascertaining the fair market value as of March 1, 1913, of the land involved in the present controversy. (R. 37.)

³ Others of the Bliss family who owned stock in the taxpayer corporation also withdrew and surrendered their stock in exchange for land. The acreage and shore feet distributed to them from the various tracts shown in taxpayer's Exhibit 8 are listed in taxpayer's Exhibit 15. (R. 100-105.)

In 1910 appraisals were made of two tracts of land on the east side of Lake Tahoe, in Nevada, one consisting of 80 acres located $\frac{1}{4}$ mile from shore near Glenbrook and one consisting of $227\frac{1}{2}$ acres with shore front on Zephr Cove, in connection with the settlement of the estate of Duane Leroy Bliss, the deceased owner. The 80-acre tract was appraised at \$.50 per acre and the tract with shore frontage was appraised at \$2.50 per acre. (R. 31.) In 1921 an appraisal was made of an 80-acre tract on the east side of Lake Tahoe in connection with the settlement of the estate of Elizabeth T. Bliss. This tract was located $\frac{1}{4}$ mile from the shore near Glenbrook and was appraised at \$4 per acre. (R. 31.)

In its federal capital stock tax return for the fiscal year ended June 30, 1916 (Exhibit "B"), the taxpayer reported as the fair market value of the 520 outstanding shares of its capital \$104,000 which was computed on the basis of approximately \$3 per acre for all of the land then owned by it. The return contains the following note (R. 32, Exhibit "B"):

This Company is the owner of 35,000 to 40,000 acres of land situate around Lake Tahoe, at an elevation of from 6300 to 9000 feet above sea level, which is rented for grazing purposes at the rate of from 5¢ to $7\frac{1}{2}$ ¢ per acre per year. This income will not pay expenses.

In the last five years this Company has sold 640 acres, netting about \$5.00 per acre. Some of this land might answer for hotel sites, at a higher valuation, but would say as a whole it could not be sold for over \$3.00 per acre if at that. Consequently have written in paragraph 8—520 shares at \$200.00 per share, equal to \$104,000.00.

In its federal income and excess-profits tax return for the calendar year 1918 (Exhibit "I") the taxpayer, in answer to the question "What was the fair value of the total capital stock of the corporation as determined in the last assessment of the capital stock tax?" said "No market value. Assets consist entirely of lands; impossible to make definite estimate." (R. 32, Exhibit "I", p. 6.)

In its original federal capital stock tax returns for the fiscal years 1922, 1923, 1924, and 1925, the taxpayer declared the fair

value of its 520 outstanding shares of capital stock at \$102,949.95, \$92,964, \$72,123, and \$71,066, respectively. (Exhibits "H", "O", "P", and "Q".) These declarations, as the Board correlated them with the taxpayer's admitted acreage for the several years, showed an average value per acre for the respective years as \$2.33, \$2.19, \$1.35, and \$1.65. (R. 33.)

In answer to an inquiry from the Commissioner of Internal Revenue of August 5, 1926, with respect to its capital stock tax values for the years 1919 to 1926, inclusive, the taxpayer replied on September 16, 1926, in part, as follows (R. 33-34. Exhibit "M"):

This Company was originally organized in 1873 to conduct a wood and lumber business, but for the past thirty years or more that portion of its business has been discontinued and it is now but a liquidating company, the limited rentals and other incidental receipts not even paying taxes and operating expenses, and there has been but a limited demand to purchase the property of the company. * * * The truth is—the property is worth just what the company can get for it; there has been but a limited demand for many years and there is a serious question as to whether this liquidating company should pay a Capital Stock Tax, but we wish above all things to be fair, and we are therefore enclosing amended returns for the years 1923, 1924 and 1925 on basis of the capitalized value. We feel that the previous returns have been fair in view of the facts above recited, and should you agree, shall be pleased if you will cancel the enclosed returns; if you feel however, that the latter should be filed, we respectfully request that the returns previous to these be accepted as representative of a fair capitalized value.

The 11,187 acres of land here in question were included in the land valued by the taxpayer in computing its 1916 capital stock tax return at an average value of \$3 an acre. It was the opinion of William S. Bliss, president of the corporation, in 1917 that this was the average value of the corporation's land in that year, when he signed the 1916 capital stock tax return. (R. 34.)

On January 29, 1918, at a meeting of a majority of the trustees of the taxpayer, there was adopted the following resolution, which was approved by W. S. Bliss, as president (R. 34, Exhibit 13):

Resolved: The Carson & Tahoe Lumber & Fluming Co., represented by its duly qualified and acting officers, desiring to comply with the United States Income Tax Law, in order to arrive at the value of the Company's property as of March 1st, 1913, does hereby fix as the actual value of its real estate holdings located in Washoe, Ormsby and Douglas Counties, Nevada, and El Dorado and Placer Counties, California, as being of the value of \$260,000, as of date of March 1st, 1913.

In 1913 the taxpayer had about 44,000 acres in the tracts above referred to. (R. 35.)

During the year 1913 the taxpayer owned approximately 17,970 acres of land in Douglas County, Nevada, including the 11,187 acres here in question. All the 17,970 acres were assessed for state, school and county taxes levied in that year, without any segregation of land into classes, on the basis of a value of approximately \$1.44 an acre. On January 1, 1923, when William D. Park, assessor at the time of the hearing in this case, came into office, all this land was assessed, still without any segregation into classes, at \$1.25 per acre. The first segregation was made in that year, when mountain land was classified at \$1.25 or \$2 and grazing land at \$8, \$5 and \$3, depending upon its quality. No segregation of lake front property in Douglas County was made until 1926, 1927, or 1928, when such land along the lake became more valuable and was selling at good prices. Park was assisted in his classifications of land by Charles Fulstone, Land Commissioner of the Nevada Tax Commission, the same person who purchased several parcels of Lake Tahoe land from the taxpayer, including the parcel called "Skyland." (R. 35.)

For the years 1920 and 1921 the taxpayer filed with the assessor of Douglas County written declarations as to the value of its real property in that County, declaring it without classification at \$1.25 per acre. In each instance the assessor raised

the valuation to \$2 per acre. (R. 35-36, Exhibits "F" and "G".)

Frank Murphy was vice-president of the taxpayer corporation from 1926 to 1939. From 1928 on, after W. S. Bliss and certain members of his family withdrew from the corporation, there remained outstanding only 358 shares of the corporation's stock. Murphy owned five of these shares and during 1935 and 1936 he had proxies to 219.3 and 263.3 more shares, respectively. (R. 36.)

During 1935, Frank Murphy offered to the United States Forestry Service, all the backlands owned by the company in Douglas County, Nevada, including the backlands of the acreage here in question, for \$3 per acre, and all of the company's shore land in that County, exclusive of Zephhr Cove, for \$10 per acre. At the same time he offered to the Forestry Service 2,240 acres of backlands owned by the company in California, south of the lake, for \$3 per acre. After having all these lands checked by its appraisers, the Forestry Service concluded that the California lands offered were more valuable than the backlands in Douglas County, Nevada, and in 1938 it bought the California lands for \$3 per acre. (R. 36.)

SUMMARY OF ARGUMENT

The taxpayer sold 11,187 acres of land in 1938 which it had acquired long prior to March 1, 1913. In order to determine the amount of gain upon the sale for federal income tax purposes it is necessary to determine the fair market value of the land as of March 1, 1913. The controversy concerning this value was submitted to the Board of Tax Appeals and the Board, upon all of the evidence before it, found the value as of the basic date to be \$75,000.

The value of the lands involved as of the basic date is a question of fact to be determined from the evidence. It is a conclusion which the Board is permitted to draw from the evidence and its finding cannot be set aside on appeal if supported by substantial evidence, even though the reviewing court would have drawn a different conclusion.

In this case the finding of value made is amply supported by the evidence and its decision should be affirmed.

ARGUMENT

The finding of the Board of Tax Appeals that the land sold by the taxpayer in 1938 had a value on March 1, 1913, of \$75,000 is supported by the evidence

In 1938 the taxpayer sold 11,187 acres of land, with improvements, for a total consideration of \$300,433.27. In reporting its gain from this sale in its 1938 income tax return the taxpayer used a cost or other basis of \$185,442.25, which included \$30,428.25 as cost of improvements. (R. 26.) Neither the amount of the consideration received nor the cost of improvements is in controversy. This leaves in issue only the cost or other basis of the land sold by the taxpayer which should be used in computing the gain on the sale.

The land sold by the taxpayer in 1938 was acquired long prior to March 1, 1913, and under Section 113 (a) (14) of the Revenue Act of 1938, *supra*, the basis for computing the gain or loss under that Act upon the sale in question is the cost of the property, adjusted in accordance with subsection (b) of that section, or the fair market value of the property on March 1, 1913, whichever is higher. There is no contention that the adjusted cost of the property was higher, so the fair market value of the land in question on March 1, 1913, is the proper basis for computing the taxpayer's gain or loss upon the sale in 1938.

In reporting its gain from the sale the taxpayer used \$155,014 as the fair market value on March 1, 1913, of the lands involved. (R. 26.) As just stated, the Commissioner reduced this value by \$15,501.85, or to \$139,512.15 (R. 13-15, 26), in determining the deficiency from which the taxpayer appealed. In its petition to the Board of Tax Appeals the taxpayer alleged that the March 1, 1913, value of the land sold was \$192,217.36. (R. 9-10.) In his amended answer the Commissioner alleged that the fair market value was not in excess of \$60,000. (R. 21.) The Board found, on the evidence, that the fair market value of the land in question on March 1, 1913, was \$75,000. (R. 36.)

The taxpayer admits that the question of value is a question of fact and that on appeal the jurisdiction of the Circuit Court

of Appeals is limited to a determination whether the Board's finding is supported by the evidence. (Br. 11-12.) The substance of its contention in this case is that the Board's finding of value is not supported by any evidence and must therefore be reversed and at the outset it cites a number of decisions in which it says the decision of the Board was reversed because its finding of value was not supported by substantial evidence. (Br. 12-13.)

It is not contended by the Commissioner that the Circuit Courts of Appeals have not, or cannot, reverse a decision of the Board when its finding of value is not supported by the evidence. We submit, however, that this is not a case in which a reversal of the Board can be justified on this ground. For that reason, it is not necessary to examine in detail the several cases cited by the taxpayer to determine whether the reversal was justified under the circumstances of the particular case. It might be noted, however, that in *Helvering v. Rankin*, 295 U. S. 123, cited by the taxpayer (Br. 12), the Supreme Court reversed the decision of the Circuit Court of Appeals for the Third Circuit because that court had refused to approve a finding of value made by the Board of Tax Appeals. More recently the Supreme Court has made it even clearer that review by the Circuit Courts of Appeals of findings of fact by the Board must be limited to determining whether the findings are supported by the evidence. See *Palmer v. Commissioner*, 302 U. S. 63, 70; *Helvering v. Nat. Grocery Co.*, 304 U. S. 282, 291; *Colorado Bank v. Commissioner*, 305 U. S. 23, 27; *Helvering v. Kehoe*, 309 U. S. 277, 279.

In *Elmhurst Cemetery Co. v. Commissioner*, 300 U. S. 37, the Circuit Court of Appeals for the Seventh Circuit had rejected the Board's finding of value. The Supreme Court, in reversing the decision of the Circuit Court, said (*id.*, p. 40):

This action, we think, amounted to an unwarranted substitution of the Court's judgment concerning facts for that of the Board. There was substantial evidence, as appears above, to support the latter's conclusion, and in such circumstances this must be accepted. It is the function of the Board to weigh the evidence and declare

the result. We undertook to state the applicable rule in *Helvering v. Rankin*, 295 U. S. 123, 131, and *General Utilities & Operating Co. v. Helvering*, 296 U. S. 200, 206.

In *Palmer v. Commissioner*, *supra*, where the Circuit Court of Appeals for the First Circuit had rejected certain findings of value made by the Board, the Supreme Court said (*id.*, p. 70):

The findings are inferences which the board was free to draw from all the facts and circumstances disclosed by the record. Such a determination of fact is not to be set aside by a court *even if upon examination of the evidence it might draw a different inference.* * * *
[Italics supplied.]

In *Helvering v. Kehoe*, *supra*, where the Circuit Court of Appeals for the Third Circuit had based its decision upon its review of the evidence rather than upon the Board's findings, the Supreme Court said (*id.*, p. 279):

Under the rule often announced, the function of the Board of Tax Appeals is to weigh the evidence and declare the result as to matters properly before it. Upon review the court may not substitute its judgment of the facts for that of the Board. When there is substantial evidence to support the conclusion of the latter this must be accepted. * * *

It should also be noted that all of the cases cited by the taxpayer (Br. 12-13) except *Andrews v. Commissioner*, 135 F. 2d 314 (C. C. A. 2d),⁴ were decided before the decisions of the Supreme Court in the cases just cited. To the extent that any of them may have been contrary to the principles announced by the Supreme Court they no longer would be good law. Also, it might be noted that in some of the cases cited (Br. 12-13), such as *Chicago Ry. Equipment Co. v. Blair*, 20 F. 2d 10 (C. C. A. 7th), *Nachod & United States Signal Co. v. Helvering*, 74 F. 2d 164 (C. C. A. 6th), and *Belridge Oil Co. v. Commissioner*, 85 F. 2d 762 (C. C. A. 9th), the Board of Tax Appeals merely affirmed the Commissioner's determination on the

⁴The *Andrews* case, *supra*, is now pending before the Supreme Court on petition for a writ of certiorari filed by the taxpayer, October Term, 1943.

ground that the evidence failed to overcome its presumptive correctness, and in doing so, completely ignored positive evidence of value introduced by the taxpayer. As will be seen, that is not the situation here. Finally, it should be remembered that the decision in each case depends primarily upon the facts of that particular case.

The question of valuation for federal tax purposes, as well as for other purposes, has been the subject of an enormous amount of litigation. It is one of the most difficult and elusive questions the courts have been called upon to decide.⁵ The term "fair market value" as used in the statute here involved has been variously defined by the courts. See *Chicago Ry. Equipment Co. v. Blair*, *supra*;⁶ *Houghton v. Commissioner*, 71 F. 2d 656 (C. C. A. 2d), certiorari denied, 293 U. S. 608; *Helvering v. Kendrick Coal & Dock Co.*, 72 F. 2d 330 (C. C. A. 8th), certiorari denied, 294 U. S. 716; *Kitrell v. United States*, 79 F. 2d 259 (C. C. A. 10th), certiorari denied, 296 U. S. 643; *Commissioner v. Marshall*, 125 F. 2d 943 (C. C. A. 2d); *Andrews v. Commissioner*, *supra*.⁷

Despite any attempted definition, however, the real problem in any case is to determine a value based on the evidence at hand. Such a determination is at best only a conjecture. As stated in *Commissioner v. Marshall*, *supra* (p. 946), a finding of value "involves a conjecture, a guess, a prediction, a prophecy." Given one set of facts the "guess" or "prophecy" may be fairly accurate, while on another set of facts, such as the facts involved in the *Marshall* case, *supra*, where the uncertainties of the future are involved, the guess may turn out to be all wrong.⁸

⁵ For a discussion of the question as it relates to the federal tax laws, see 10 Mortens, *Law of Federal Income Taxation*, c. 59.

⁶ For the later proceedings in this case see *Chicago Railway Equipment Co. v. Commissioner*, 13 B. T. A. 471, modified, 39 F. 2d 378 (C. C. A. 7th), reversed, 282 U. S. 295.

⁷ See note 4, *supra*.

⁸ In *Helvering v. Safe Deposit Co.*, 316 U. S. 56, the Supreme Court remanded a case to the Board of Tax Appeals to make a finding of value, and in doing so it said (p. 66) "In remanding this case to the Board of Tax Appeals for a determination of this issue, we recognize that a decision must necessarily be an approximation derived from the evaluation of elements not easily measured."

The taxpayer asserts that the burden of proof was upon the Commissioner in this case because he repudiated his original determination when he filed his amended answer asking for an increased deficiency. (Br. 13-14.) But regardless of any presumption which attached to the Commissioner's original determination of deficiency, it is clear from the record that the question of value here involved must be decided on the evidence. Cf. *Del Vecchio v. Bowers*, 296 U. S. 280.

The taxpayer also insists that the Board "made no finding and set forth no evidence which would indicate or support" the finding of \$75,000 value. (Br. 14, 16.) To support this statement it is said that the Board "gives no inkling of the method or formula which it used" to reach its final result; that the value found "does not approximate" any value claimed by either party; that no witness testified to any such value; that while findings indicate the shore land to have been more valuable than the back land, yet there is nothing in the findings or opinion to indicate that the Board made any distinction in arriving at its valuation; that there is nothing in the findings or opinion to indicate that the Board "employed any method" to reach the value found; that it "would take a nebulous formula indeed to determine the value of the lands in question" from the sales listed in the findings (Br. 16-18), and that this failure "to set forth the evidence or other basis upon which it determined the value found is in itself sufficient grounds for reversal of the decision" (Br. 37). It is therefore concluded that the finding of the Board was "purely arbitrary" and is not supported by the evidence. (Br. 18, 37.)

The taxpayer devotes some space to its so-called "analysis of the evidence." (Br. 26-32.) Some of this discussion pertains to lack of evidence which might have been helpful in arriving at a more accurate valuation if the matters mentioned had been proved; the rest of it is in substance a declaration that none of the evidence in the record is evidence of the 1913 value except that evidence upon which the taxpayer relies. In other words, the value fixed by the witness Bliss and corroborated by the witness Comstock "was the only evidence before the Tax Court with regard to the March 1, 1913 value of the land in question." (Br. 35.)

We submit that every bit of evidence in the record shows that the valuation placed upon the land of the taxpayer in 1912 was not its fair market value on March 1, 1913. The Board was not required to accept Bliss' estimate, regardless of his qualifications as an expert, under all of the circumstances of the case. And certainly the weight to be given his testimony was a matter for the Board to judge.

The taxpayer says it is apparent from the Board's findings and opinion that "little or no consideration" was given to the testimony of the witness Bliss. (Br. 34.) This is error. It found as a fact that the prices named in the option agreement with Brewster, Edwards and Wooster were those which Bliss felt in 1912 would be realized over a period of five years. (R. 29.) And it is clear that his testimony was given full consideration along with all other evidence in arriving at its conclusion. But it is also clear from all of the evidence that his 1912 estimate did not represent the fair market value of the land in question at the basic date.

The valuation upon which the taxpayer relies was made in 1912, but the basis of that valuation is not clear. It clearly could not have been based on established market prices for such land because the record indicates that very little land of any description had changed hands for several years prior to 1912. It is not shown whether the estimate was based on the value of the various tracts as farm land, as grazing land, as timber land, as residential property, or for what they were valuable. It is clear that the land owned by the corporation had not for some time, and did not thereafter, produce enough income to pay the expenses of the corporation. It is also clear that other officers of the corporation, who may have been as well qualified as Mr. Bliss, thought the value he had placed on it was too high, and this difference of opinion eventually led to the latter's withdrawal from the corporation.

The agreement with Brewster, Edwards and Wooster merely granted them an option to purchase the total acreage at the rate of a specified percentage each year over a period of five years. It is clear from the provisions of the original agreement (R. 74-82), and particularly the application for a year's extension (Exhibit 9), that Brewster, Edwards and Wooster

were only interested in the matter as a speculative proposition and had no intention of purchasing the land themselves.

It is not clear from the record whether the price named in the option was based on Mr. Bliss' appraisal of the land, or whether the appraisal was made as a form of allocation of the option price after it already had been agreed upon.

In any event, subsequent events proved that the values fixed under the terms of the option agreement were far too high. This is shown by subsequent sales. (R. 100-105.)

Besides the sales, there is much other evidence that the value of the land involved was generally much lower than estimated by Mr. Bliss in 1912. The appraisals made in connection with the settlement of the estates of Duane Leroy Bliss and Elizabeth T. Bliss, the appraisals for local and state taxes, the sales to the Forestry Service, and the statements made in connection with income and capital stock tax returns of the taxpayer all are evidentiary facts bearing upon the question of value and all must be given their due weight in arriving at a conclusion. The same is true of all other facts found by the Board. *Whitlow v. Commissioner*, 82 F. 2d 569 (C. C. A. 8th).

All of these statements except one—that signed by S. C. Bigelow as secretary on September 16, 1926, were signed by W. S. Bliss as president of the corporation. (R. 32-35.) The taxpayer terms these statements "discredited representations." (Br. 31.) But they are convincing admissions against interest, particularly when considered in connection with all of the other evidence.

The taxpayer is therefore in error in asserting that if the testimony of Mr. Bliss and Mr. Comstock are disregarded there is then "no evidence whatsoever in the entire record" upon which a finding of value can be made. (Br. 36.)

Furthermore, the Board was entitled to take into consideration all evidence relating to subsequent events in order to determine the 1913 value of the land in question. See *Doric Apartment Co. v. Commissioner*, 94 F. 2d 895 (C. C. A. 6th), and cases cited. In fact, all evidence bearing upon the value of the land at the basic date is admissible. *Whitlow v. Commissioner, supra*. It is the duty of the Board to weigh that evidence and announce its conclusion.

The taxpayer calls the finding of the Board arbitrary, presumably in that it made a lump sum finding that the value was \$75,000 for all of the land sold without endeavoring to find the value on the basis of separate tracts. However, the price named in the 1912 option for all of the land then owned was a lump sum, and the price paid for the land here involved was a lump sum. There can be no reason why a finding of value in round figures, particularly in a case like this, would not be just as accurate as a finding based on a separate valuation of individual tracts.

The Board's finding of value in this case represents its best estimate of the March 1, 1913, value of the property involved, based on all of the facts before it. Another court might conclude from the same evidence that the value was more or less. The taxpayer says a value of \$25,000 or \$200,000 would find as much support in the evidence as the finding of \$75,000. (Br. 17.) This statement is a little extreme, but at most a finding of value can only be the evaluation of all of the evidence by the trial court, and there well might be an honest disagreement among courts as to the true value which the evidence establishes. However, as the Supreme Court said in *Palmer v. Commissioner*, *supra*, such finding is an inference which the Board was free to draw from all of the facts and circumstances disclosed by the record and such a finding by the Board is not set aside, even if upon examination of the evidence the reviewing court might draw a different inference.

The argument (Br. 38-40) that the Board of Tax Appeals erred in determining a greater deficiency than that set forth in the deficiency notice is without merit. The sufficiency of his claim for an increased deficiency (R. 17-22) cannot be questioned. See *Helvering v. Edison Securities Corp.*, 78 F. 2d 85 (C. C. A. 4th); *Commissioner v. Ray*, 88 F. 2d 891 (C. C. A. 7th), certiorari denied, 301 U. S. 711. The substance of the argument is that the Commissioner failed to bear the burden of proving that the March 1, 1913, value of the land in question was less than that used in the deficiency notice. But, as has already been pointed out, the Board made its finding on the basis of all of the evidence and its finding

should stand. Neither is there any merit to the argument (Br. 40-44) that since the Commissioner, by affirmative plea, alleged that the March 1, 1913, value of the land in question was not in excess of \$60,000 he abandoned his original determination and now the Board is without authority to redetermine any deficiency. The Board's jurisdiction was invoked to redetermine the deficiency originally determined by the Commissioner. By proper pleading the parties put into issue the question of the March 1, 1913, value of the land sold by the taxpayer in 1938; the issue was submitted on the proofs, and the Board has fulfilled its function by determining the issue in controversy.

CONCLUSION

The decision of the Board of Tax Appeals is right. It is supported by the facts and the law and should be affirmed.

Respectfully submitted.

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SEPTEMBER, 1943.

No. 10,380

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

CARSON AND TAHOE LUMBER AND FLUMING CO.
(a corporation),

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S REPLY BRIEF.

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PAUL P. O'BRIEN,
CLERK



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Respondent.

PETITIONER'S REPLY BRIEF.

**(1) PARTIES ARE IN SUBSTANTIAL ACCORD WITH REGARD
TO THE PRINCIPLES OF LAW.**

The parties hereto appear to be in substantial accord with regard to the basic principles of law involved in this appeal. Respondent agrees that this Court has jurisdiction to review the case to determine whether the findings and decision of The Tax Court are supported by substantial evidence and may reverse the decision if it is determined that it is not supported by substantial evidence. Likewise petitioner agrees that if there is substantial evidence to support the decision of The Tax Court a Circuit Court will not reverse the decision merely because it would have reached a different conclusion from the evidence.

While respondent expressly agrees with the above principles of law which have been established by a long line of decisions (see Petitioner's Opening Brief, p. 12), respondent's argument in support of the decision herein seems to be based upon the theory that if there is any evidence of facts which have a bearing upon value the finding of The Tax Court must be accepted without regard to whether there is any basis in the evidence upon which the specific value found can be supported.

Petitioner submits that the above stated theory is erroneous and is contrary to the rule established by decisions of this Court and other Courts of Appeal. *A finding of value by The Tax Court must be based upon the evidence presented to it and must be supported by substantial evidence.* Respondent states (Respondent's Brief, p. 19): "The Board's finding of value in this case represents its best estimate of the March 1, 1913, value of the property involved, based on all the facts before it".

The quoted statement could be made of any case. It is assumed without question, that in every case, the trial judge makes an honest and conscientious effort to determine the case from the evidence and that in a valuation case the value found is the trial judge's best estimate based upon the facts before him. If that were all that were necessary to support a decision, no decision based upon a finding of value could be reversed without a showing of bad faith. Petitioner submits that it is not sufficient that the value found represents the best estimate of the

trial judge. The value found must also be supported by substantial evidence.

While it is necessarily true that a finding of value must be, to a certain extent, an estimate or guess, it is also true that such estimate or guess must be based upon the evidence and must be a reasonable estimate supported by substantial evidence.

Andrews v. Commissioner (2 Cir. 1943), 135 F(2d) 314;

Tex-Penn Oil Co. v. Commissioner (3 Cir. 1936) 83 F(2d) 518.

(2) RESPONDENT POINTS TO NO EVIDENCE WHICH SUPPORTS THE VALUE FOUND BY TAX COURT. THERE IS NO SUCH EVIDENCE.

In its petition for review (R. 39) and in its opening brief petitioner clearly and definitely challenged the value found by The Tax Court on the ground that it was not supported by substantial evidence and was contrary to the only competent evidence of value in the record. *It is significant that in his brief respondent points to no evidence which supports the value found by The Tax Court and suggests no theory or basis upon which the value found could be determined from the evidence in the record.* The answer is that there is no such evidence.

Respondent limits his argument to criticism of the evidence which supports the value contended for by petitioner and to the statement that the value found was The Tax Court's best estimate of value from the

evidence. Even if it should be determined that the evidence does not support the value claimed by petitioner, such failure of evidence does not authorize The Tax Court to arbitrarily fix a value or to find a value not established by the evidence.

Respondent's statement of facts is a restatement of the portion of the evidence set forth by The Tax Court as its findings of fact. Respondent, like The Tax Court, has set forth as facts the evidence which made the property appear undesirable and has ignored much of the favorable evidence given by more competent witnesses.

Respondent repeats the finding of The Tax Court that the property in question was inaccessible, because of poor roads, and was less desirable than other land around Lake Tahoe because of unfavorable climatic conditions. This evidence was given by witnesses in the Forestry Service, most of whom did not visit the land until many years after 1913. The witnesses who were best acquainted with the land in 1913 testified that the road was not considered bad and was used by automobiles long prior to 1913 (R. 218, 219). The road was as good as the road from Truckee to Tahoe City (R. 218). There was no evidence that the road was only suitable for horsedrawn vehicles. Mr. Comstock also testified that the Nevada side of the Lake was just as desirable as the California side (R. 215). But even if the testimony that the land in question was not as desirable or as accessible as the land on the California side is accepted, and the contrary evidence of other witnesses is disregarded, these facts do not

establish a dollar value for the land or support the value found by The Tax Court.

Respondent refers to the finding of The Tax Court that waterfront property on the California side of Lake Tahoe near Tahoe City was selling in 1916 for from "five to ten times as much as that on the east side of the Lake" (R. 28), Neither respondent nor The Tax Court mention the fact that the witness who so testified also testified that some of the California land referred to "couldn't have been acquired * * * for less than five hundred to a thousand dollars an acre" (R. 344-345). Even on the basis of that testimony the Nevada land was worth fifty to one hundred dollars an acre. That statement certainly does not support the finding of The Tax Court of an average value of \$6.70 per acre.

Respondent also refers to the probate appraisals of land in the vicinity, to appraisals for property tax purposes, to sales of other land and to statements regarding value in petitioner's tax returns as being evidence of value. As stated in petitioner's opening brief, there is nothing in the record to show by whom one of the probate appraisals was made and the other was made in 1921 by a man who had no qualifications as an expert (See Petitioner's Opening Brief, p. 30). The same is true of the property tax appraisals. Such appraisals are entitled to no weight unless it appears that the persons who made them were qualified. *Carnrick v. Commissioner*, 21 B.T.A. 12; *Mertens, Law of Federal Income Taxation*, Vol. 10, p. 452. The sales of other property were not shown to be comparable

and the statements in the returns were declared by the persons responsible therefor to be arbitrary statements having no relation to March 1, 1913 value of the land (R. 132-133, 234). Such evidence and statements cannot be considered substantial evidence. Neither does that evidence have any apparent relation to the value found by The Tax Court.

Respondent also questions the testimony of Mr. Bliss and Mr. Comstock. Weaknesses, if any, in the testimony of Bliss and Comstock do not establish a value other than that to which they testified.

Respondent makes no attempt to show wherein the evidence referred to by him supports the value found by The Tax Court. He merely states that it was evidence which was entitled to consideration in determining the value of the property.

Respondent fails to distinguish between direct evidence of value and evidence of secondary facts which have a bearing upon value. Certainly the condition of the roads, the accessibility of the property, the climatic conditions and the availability for recreational purposes have a bearing on value but those facts alone furnish no basis upon which a person not familiar with the land and values in the vicinity can place a dollar value on particular property.

There was a great deal of evidence of facts which might have a bearing on value but there was no evidence of the value of the land in question except the appraisal and testimony of Mr. Bliss and the corroborative testimony of Mr. Comstock. None of the other witnesses expressed an opinion with regard to the value of the land in question as of 1913 or any

other date. There was evidence of sales of property in the vicinity but there was no evidence from which a comparison could be made between the properties sold and the 11,187 acres of land in question. Also, the sales prices varied over such a wide range that they furnish no basis for determination of an average value.

The issue in this case was not the comparative merits of lands in general around Lake Tahoe but the amount of the fair market value on March 1, 1913 of the particular 11,187 acres of land here involved.

(3) THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT ANY BASIS FROM WHICH A \$75,000 VALUATION COULD BE COMPUTED.

The 11,187 acres of land in question included many different types of land with widely varying values. There was no evidence in the record from which it could be determined how much of the land should be placed in each classification. Such evidence was not necessary in connection with the appraisal and testimony of value by Mr. Bliss and the testimony of value by Mr. Comstock for they were thoroughly familiar with the land and took all of the facts into consideration in fixing the value placed upon the land. No one not familiar with the land could have made a reasonable determination of value without knowing at least approximately the number of acres in each classification. As the Judge of the Tax Court had no such knowledge it is submitted that his determination of value for the 11,187 acres must necessarily have been

without consideration of the various types of property included and, therefore, wholly arbitrary.

Petitioner's contention in this regard is not based upon the fact that the Tax Court found a lump sum value, as respondent suggests, but rather that no one could make a reasonable determination of the value of 11,187 acres of land of various classifications with different values without knowing how many acres were to be included in each classification. The fact that the Tax Court made no reference to the values of different classifications of land but merely stated that the value of the land on March 1, 1913 was \$75,000, and the fact that the Tax Court had no knowledge of the character of the land involved indicates quite clearly that the \$75,000 was merely an arbitrary guess without foundation or support in the evidence before the Court.

While a trial Court must be allowed considerable leeway in determining value and the Court may weigh the evidence and make allowance for facts which may affect the value of the property involved, a finding of value must be based upon and supported by substantial evidence. Where the trial judge has no independent knowledge of the property and values, a finding of value which has no relation to the evidence cannot be justified on the ground that it represents the trial Court's best estimate. The Court's estimate or determination of value must be within the reasonable limits established by the evidence.

Suppose that in the present case respondent had introduced no evidence and that the only evidence before the Court was the testimony of Mr. Bliss cor-

roborated by Mr. Comstock that the fair market value of the property in 1913 was at least \$155,014.00. Certainly under those circumstances a finding of a value of \$75,000.00 would be arbitrary and unreasonable and without support in the evidence.

The situation in the present case is no different in substance. Respondent introduced considerable evidence but offered nothing which furnished a basis for determining a dollar value for the property here involved. There was no evidence from which the land involved could be classified so that a value could be reached on the basis of the sales of other land. None of the evidence introduced by respondent pertained to or furnished a basis for determining the March 1, 1913 value of the 11,187 acres of land here involved.

(4) THE TAX COURT CANNOT IGNORE THE ONLY COMPETENT EVIDENCE. THE EVIDENCE NOT ONLY DOES NOT SUPPORT THE \$75,000 VALUATION FOUND BY THE TAX COURT BUT DOES SUPPORT THE VALUATION CLAIMED BY PETITIONER.

The valuation claimed by petitioner is based primarily upon the appraisal made by Mr. Bliss in 1912. As stated in petitioner's opening brief, the only evidence of the March 1, 1913 value of the 11,187 acres of land here involved was the testimony and the 1912 appraisal of Mr. Bliss which was corroborated by Mr. Comstock. Both of these witnesses were thoroughly familiar with the land, the conditions which existed in 1913, and with sales of other properties. In determining the value which he placed on the land in 1912 Mr. Bliss took into consideration the various ele-

ments which have a bearing upon the value of land of that type. (R. 127-128.) A contemporary appraisal made on or about the basic valuation date by a person qualified and competent to make an appraisal is entitled to great weight and should not be ignored. *Empire Machine Co. v. Commissioner*, 16 B.T.A. 1099, 1110.

In its Findings of Fact (R. 30) The Tax Court listed the sales in the vicinity from 1903 to 1923. Examination of these sales discloses that the appraisal of Mr. Bliss was none too high and also indicates that the value found by The Tax Court is much too low.

Those sales of land which were *part of the very land appraised by Mr. Bliss*, are listed below with additional columns showing the sales price, the value at which the property was appraised by Mr. Bliss in 1912 as shown by petitioner's Exhibit 15 (R. 100-105) and the percentage of the sales price to the appraisal value:

Indee	Date of Sale	Acres	Location	Price per Acre	Sales Price	Appraised Value	Percent of sales price appraised value
			1 $\frac{3}{4}$ miles from shore				
etert	1913	640	(good timber land)	\$ 6.00	\$ 3,840.00	\$ 3,840.00	100%
igot	1917	80	Unknown	12.50	1,000.00	1,000.00	100%
owgill	1919	40	$\frac{1}{2}$ mile from shore	6.00	240.00	240.00	100%
e Vaux	1920	40	$\frac{3}{4}$ mile from shore	10.00	400.00	240.00	166.7%
ulstone	1920	1160	Unknown	4.28	4,965.00	5,800.00	85.6%
ulstone	1920	1634	Unknown	6.78	11,089.00	13,072.00	84.9%
hmeidel	1921	4 $\frac{2}{3}$	Shore front	764.59	3,563.00	3,563.00	100%
ulstone	1922	922	Unknown	5.75	5,301.50	5,993.00	88.5%
ardy	1922	37	Shore front	67.56	2,500.00	3,110.00	80.4%
ulstone	1923	416	Zephyr Cove				
			Part shore front	21.63	9,000.00	18,850.00	47.5%

The first sales were at 100% or more of the appraised value and it was not until 1920 that a sale was made at less than the value at which the land was appraised by Mr. Bliss. The record shows that the property sold to Mr. Fulstone in 1923 at 47.75% of the appraised value was made under the pressure of need of cash (R. 112), and that the property was resold shortly thereafter by Mr. Fulstone for \$18,000 or 95.4% of the appraised value (R. 164). Mr. Bliss also testified that he didn't think \$9,000 was a fair price for that property (R. 164). Mr. Bliss testified that all of the sales to Mr. Fulstone were made under the pressure of need of money (R. 112).

The sales above listed at prices per acre even approximating the average per acre value of \$6.70 determined by the Tax Court were considerable distance from the lakeshore. The properties, the location of which is stated above as "unknown", are shown by petitioner's Exhibit 15 (R. 100-105), to have included no shore frontage. It is clear from the record that the shore land had a considerably greater value than the back land.

The sales listed by The Tax Court which were of lands not included in the 1912 appraisal of Mr. Bliss were as follows:

Vendee	Date	No. of Acres	Location	Price per Acre
Joseph W. Hall	1903	8.58	Shore Front (Skunk Harbor)	\$ 1.25
Joseph W. Hall	1903	25.15	Shore Front	1.25
Harry O. Comstock	1910	2	Shore front on south-eastern side of Lake on Calif.-Nev. border (beach)	500.00
Wm. McFaul	1911	160.00	Small part shore front (Marla Bay)	1.25
Harry O. Comstock (Vendor)	1915	2	Shore front on south-eastern side of Lake on Calif.-Nev. border (beach)	1,500.00
Eliz. M. Beatty (Vendor)	1921	153.00	Shore front (between Zephyr Cove and and Glenbrook)	26.14
Newhall	1922	290.67	Shorefront (between Skunk Harbor & Secret Harbor)	18.96

The sale listed by The Tax Court as being made to Wm. McFaul in 1911 at \$1.25 per acre is believed to be in error. Mrs. Allerman testified that her father, Mr. McFaul, purchased property known as Round Mountain in 1911 for \$200.00 (R. 268) but she did not know the acreage (R. 267). The 160 acres used by The Tax Court was the acreage of the Marley Ranch (R. 266). Twenty-three acres of land purchased by Mr. Hall in 1903 at \$1.25 per acre were sold by him in 1925 at over \$217.00 per acre (R. 253).

Petitioner submits that the above sales corroborate the soundness and the fairness of the appraisal made by Mr. Bliss in 1912. Said sales furnish no support whatever for the value found by The Tax Court.

It cannot be doubted that Mr. Bliss and Mr. Comstock were thoroughly familiar with the land in question and with land values in that vicinity. The testimony of these witnesses is the only evidence in the record with regard to the value of the 11,187 acres in question. It is respectfully submitted that The Tax Court erred in disregarding the value placed upon the land by these witnesses and finding a value which has no apparent relation to any evidence in the record and which appears to be a purely arbitrary figure.

Andrews v. Commissioner (2 Cir. 1943) 135 F (2d) 314.

(5) THERE IS NO BASIS IN THE RECORD FOR A FINDING OF A VALUE LESS THAN THE BLISS APPRAISAL. THE BURDEN OF PROOF WAS UPON THE RESPONDENT TO PROVE A DIFFERENT VALUE, AND SINCE HE FAILED IN MEETING THIS BURDEN THE TAX COURT SHOULD HAVE FOUND NO TAX DEFICIENCY.

While The Tax Court is not necessarily required to accept the value placed upon property by expert witnesses, where there is no other competent evidence of the value of the land involved and The Tax Court has no independent knowledge upon which to base a finding of value, the Court should either accept the opinion of the expert witnesses or refuse to find any value for failure of proof. In the present case The Tax Court did neither but found a value which is not supported by any evidence.

If The Tax Court was justified in disregarding the testimony of expert witnesses, it should have rendered a decision of no deficiency. In amending his answer to seek a greater deficiency respondent abandoned the determination in his original notice of deficiency and assumed the burden of proving that any deficiency in tax was due. Respondent clearly did not sustain the burden which he voluntarily assumed and he did not establish any basis upon which a deficiency in tax could be determined. If, however, respondent is entitled to the benefit of the presumption in favor of the determination in the deficiency notice, in spite of the fact that he expressly repudiated and abandoned his prior determination, there was no basis in the facts or evidence for the determination of a deficiency greater than that originally proposed by respondent.

Petitioner's contentions in this regard are applicable only if it is determined that the finding of value made by The Tax Court is not supported by substantial evidence. Of course, if the finding is supported by substantial evidence it is immaterial upon whom the burden of proof rested. But if, as petitioner contends, the value found is not supported by substantial evidence, the finding cannot be sustained on the basis of any presumption in favor of respondent's determination. The value found is far below the value determined by respondent in his deficiency notice (R. 11-15).

Ordinarily the taxpayer has the burden of proof and if he fails to establish a value The Tax Court refuses to make a finding of value and affirms the determination of the Commissioner. Here respondent re-

pudiated and abandoned his determination and assumed the burden of proof. The only evidence in the record of the March 1, 1913 value of the 11,187 acres establishes a value of \$155,014.00. If this evidence was not acceptable The Tax Court should have refused to find a value and refused to determine any deficiency for failure of proof. In any event there was no basis whatsoever for the determination of an increased deficiency (see *Yellow Poplar Lumber Co. v. Commissioner*, 12 B.T.A. 1050).

CONCLUSION.

It is respectfully submitted that The Tax Court erred in determining any deficiency in this case and that in any event it erred in determining a deficiency greater than that originally proposed. It is respectfully submitted that the decision of The Tax Court herein should be reversed with instructions to enter a decision of no deficiency.

Dated, San Francisco, California,
September 25, 1943.

Respectfully submitted,
GEORGE H. KOSTER,
BAYLEY KOHLMEIER,
Attorneys for Petitioner.

LLEWELLYN A. LUCE,
Of Counsel.

United States
Circuit Court of Appeals
For the Ninth Circuit.

JAMES W. BUTLER, MARY L. BUTLER, MARY SEGUIN,
CLARA VERSCHOOR, LILLIAN FITZGERALD, DA-
VID J. LEWIS, ELIZABETH A. LEWIS, JOHN
LINGIE SMITH, ELLA RUTH SMITH, PATRICK J.
LEONARD, ANNIE LEONARD, STEPHEN C. PERRY,
CARLE HILLEBRAND, MRS. C. C. E. HILLEBRAND,
FRED HUSSEY, MRS. H. L. GOOCH, OSCAR SWAN-
SON, MARVIN WALTER WAFER, GEORGE W.
IRVINE, BETTY DU BOIS, MRS. I. B. BRAWLEY,
MARGARET JOHNSTONE, JAMES J. PHELAN, J. H.
PEGRAM, MRS. J. H. PEGRAM, MARIE C. KNIEF,
AMOS WASHINGTON, DOROTHY LEWITZ, MARIE
C. CROSS, VIOLETTE M. CROSS, CHARLES L. FORS-
BERG and MADGE McNAUL,

Appellants,

vs.

GRACE APPLETON McKEY,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

APR 1 - 1943

PAUL P. O'BRIEN,

CLERK

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Southern Division of the United States District Court for the Northern District of California.

No. 4103R

In Equity

JAMES W. BUTLER; MARY L. BUTLER;
MARY SEGUIN; CLARA VERSCHOOR;
LILLIAN FITZGERALD; DAVID J.
LEWIS; ELIZABETH A. LEWIS; JOHN
LINGIE SMITH; ELLA RUTH SMITH;
PATRICK J. LEONARD; ANNIE LEON-
ARD; STEPHEN C. PERRY; CARLE HIL-
LEBRAND; MRS. C. C. E. HILLEBRAND;
FRED HUSSEY; MRS. H. L. GOOCH; OS-
CAR SWANSON; MARVIN WALTER WA-
FER; GEORGE W. IRVINE, BETTY DU
BOIS; MRS. I. B. BRAWLEY; MARGARET
JOHNSTONE; JAMES J. PHELAN; J. H.
PEGRAM; MRS. J. H. PEGRAM; MARIE
C. KNIEF; AMOS WASHINGTON; DORO-
THY LEWITZ; MARIE C. CROSS; VIO-
LETTE M. CROSS; CHARLES L. FORS-
BERG; and MADGE McNAUL;

Plaintiffs,

vs.

CHARLES M. PUSEY; SIEGFRIED SCHU-
LEIN, JUNIOR; SIEGFRIED SCHULEIN;
WILLIAM FORSSTROM; GRACE APPLE-
TON McKEY; E. E. FRICKE; ERMA A. LA

NOUE; MARK M. BAKER; ERMA M. ASZ-
MAN; LEONE B. HILL; MRS. L. E. HILL;
and KATHRYN RIDDELL;

Defendants.

BILL OF COMPLAINT UPON STOCKHOLD-
ERS STATUTORY LIABILITY [1*]

Plaintiffs above-named complain of defendants above-named, and for cause of action, allege as follows:

I.

That plaintiffs herein bring this suit on behalf of themselves and on behalf of all of the creditors of the Woodlawn Trust and Savings Bank, which at all of the times herein mentioned has been and now is a banking corporation organized and existing under and by virtue of the laws of the State of Illinois; that besides these plaintiffs, there are many thousands of other creditors of said Woodlawn Trust and Savings Bank whose claims against said Bank are of a nature and character similar to those of these plaintiffs, and these plaintiffs and all said other creditors have a common interest in the subject-matter of this suit, and these plaintiffs hereby undertake to represent the rights of all creditors and to maintain and conduct this as a representative suit for the benefit of all of the creditors of said Bank who may have claims of a character similar to those of these plaintiffs as herein-after set forth.

*Page numbering appearing at foot of page of original certified Transcript of Record.

II.

That plaintiffs above-named, excepting plaintiff Charles L. Forsberg, are citizens and residents of the State of Illinois; That said Charles L. Forsberg is a citizen and resident of the State of Alabama; that the defendants herein above-named are citizens and residents of the State of California; that the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of \$3,000.00.

III.

That the Constitution of the State of Illinois, more particularly Article XI, Section 6 thereof, at all of the times herein mentioned has read and provided, and does now read and provide, as follows: [2]

“Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him or her held to an amount equal to his or her respective shares so held for all its liabilities accruing while he or she remains such stockholder.”

IV.

That at all of the times herein mentioned the statutes of the State of Illinois, more particularly that certain statute entitled “An Act to revise the law with relation to banks and banking,” approved June 23, 1919, as amended June 28, 1923, and as amended June 4, 1929, which Act is commonly known as the banking law of Illinois, has

provided, and now does provide, that when any banking corporation shall have gone into liquidation under the provisions of said Act, the individual statutory liability of its stockholders, as hereinabove alleged, may be enforced by any creditor of such bank, by suit in equity in the nature of a creditor's bill, brought by said creditor on behalf of himself and all other creditors of such bank against the stockholders thereof.

V.

That said Woodlawn Trust and Savings Bank is a corporation organized and authorized to commence business on or about the 27th day of April, A.D. 1905 under and in pursuance of an Act of the General Assembly of the State of Illinois, entitled "An Act concerning corporations with banking powers," approved June 16, 1887, as subsequently amended, which said Act and amendments thereto were duly submitted to a vote of the people of this State, and ratified by them in accordance with the Constitution of this State; that the purpose for which said Woodland Trust and Savings Bank was organized was for discount and deposit, buying and selling exchange, and doing a general banking business, excepting the issuance of bills to circulate as money, and with power to loan money on per- [3] sonal and real estate security; that the capital stock of said Woodlawn Trust and Savings Bank at the time of its organization consisted of \$200,000.00 divided into 2000 shares of the

par value of \$100.00 each; and certificates for the 2000 shares originally authorized were issued and delivered to the subscribers therefor upon the organization of said Bank; that the capital stock of said Bank continued to be \$200,000.00 until, to-wit: January 13, 1919, on which date, pursuant to resolutions duly adopted at a meeting of the stockholders of said Bank, by which it was resolved to increase the capital stock of said Bank from \$200,000.00 to \$250,000.00, divided into 2500 shares of the par value of \$100.00 each, the capital stock was by appropriate entries on the books of said Bank so increased, and certificates representing the 500 shares of additional stock authorized by said resolution were issued to the subscribers therefor; that the capital stock of said Woodlawn Trust and Savings Bank continued to be \$250,000.00 until, to-wit: December 27, 1920, on which date, pursuant to resolutions duly adopted at a meeting of the stockholders of said Bank, by which it was resolved to increase the capital stock of said Bank from \$250,000.00 to \$400,000.00, divided into 4000 shares of the par value of \$100.00 each, the capital stock was by appropriate entries on the books of said Bank so increased, and certificates representing the 1500 shares of additional stock authorized by said resolution were issued to the subscribers therefor; that the capital stock of said Bank continued to be \$400,000.00 until, to-wit: January 12, 1924, on which date, pursuant to resolutions duly adopted at a meeting of the stockholders of said Bank, by

which it was resolved to increase the capital stock of said Bank from \$400,000.00 to \$500,000.00, divided into 5000 shares of the par value of \$100.00 each, the capital stock was by appropriate entries [4] on the books of said Bank so increased, and certificates representing the 1,000 shares of additional stock authorized by said resolution were issued to the subscribers therefor; that the capital stock of said Bank continued to be \$500,000.00, until, to-wit: March 18, 1927, on which date pursuant to resolutions duly adopted at a meeting of the stockholders of said Bank, by which it was resolved to increase the capital stock of said Bank from \$500,000.00 to \$600,000.00, divided into 6,000 shares of the par value of \$100.00 each, the capital stock was by appropriate entries on the books of said Bank so increased, and certificates representing the 1,000 shares of additional stock authorized by said resolution were issued to the subscribers therefor; and that the capital stock of said Woodlawn Trust and Savings Bank continued to be \$600,000.00 from the 18th day of March, 1927, to and including June 22, 1932; that from the date of its organization up to and including the 22nd day of June, A.D. 1932, said Woodlawn Trust and Savings Bank carried on an extensive banking business in the City of Chicago, with offices located at 1180 East Sixty-third Street, in said City and County, making loans, accepting deposits and in general doing the business for which it was organized.

VI.

That at the close of business on the 22nd day of June, A. D. 1932, the said Woodlawn Trust and Savings Bank was indebted to various persons, firms and corporations, including these plaintiffs, according to its books of account, in the amount of, to-wit: \$4,032,246.00, for savings deposits, certificates of deposit, Christmas savings accounts deposits, individual commercial deposits, cashier's checks, postal savings, certified checks, bills payable and rediscounts, and had other liabilities to creditors in amounts unknown to these plaintiffs; that at the close of busi- [5] ness on the 22nd day of June, A.D. 1932, the assets of said Bank, at the values at which the same were carried on the books and records of said Bank, amounted to \$4,760,948.22; that these plaintiffs are informed and believe, and so state the fact to be, that among the assets shown on the books of said Bank as its resources, and carried as assets thereon, were numerous loans, mortgages, bonds, accounts receivable and other items which were worthless, and that the value of divers other items of said resources did not equal the amounts respectively at which said items of resources were carried upon the books of said Bank, so that upon said last mentioned date the liabilities of said Bank were in excess of the assets of said Bank, and the deficiency in the assets of said Bank was, at said last mentioned date, in excess of the aggregate of its capital, surplus, reserves and undivided profits; and that said Bank was unable

to meet its liabilities as they became due in the ordinary course of business and could not pay its depositors on demand, but was wholly insolvent.

VII.

That on the 22nd day of June, 1932, by reason of the facts and circumstances aforesaid, the capital stock of said Bank had become impaired, and the condition of said Bank was such that said impairment of said capital stock could not be made good, and the business of said bank was then being conducted in an unsafe manner.

VIII.

That thereupon, on said 22nd day of June, 1932, on account of the facts and circumstances aforesaid, the said Bank was closed by resolution duly adopted by its Board of Directors, and the Auditor of Public Accounts of the State of Illinois, acting in accordance with and pursuant to the statutes and laws of the State [6] of Illinois in such cases made and provided, more particularly in accordance with and pursuant to the terms and provisions of the above-mentioned banking law of Illinois, assumed control of said Bank and closed the same, and then and there took control of its property, assets and business, all for the purpose of the reorganization or liquidation of said Bank through receivership; that since said last mentioned date said Bank has not carried on the business for which it was organized and which it had theretofore carried on as aforesaid.

IX.

That said Auditor of Public Accounts of the State of Illinois, retained possession and custody of said Bank and its assets until on, to-wit: the first day of July, A.D. 1932, on which date said Auditor of Public Accounts, pursuant to the duty imposed upon him by law and by virtue of the authority vested in him by law, more particularly by the said banking law of Illinois, determined that said Bank could not be reorganized and that the same should be liquidated through receivership, and thereupon then and there said Auditor of Public Accounts designated and appointed Harvey C. Vernon, a reputable person, as Receiver for said Bank, who thereupon, upon said last mentioned date, duly qualified as such Receiver, and as such Receiver immediately took possession of the books, records and assets of said Bank, and said Bank thereupon went into, and is now, in liquidation in accordance with Section 11 of the Banking Act of Illinois, as amended.

X.

That thereafter, on the 9th day of November, 1932, the Circuit Court of Cook County, State of Illinois, in proceedings duly commenced and prosecuted for such purpose, duly made its order and judgment ratifying, approving, and confirming the aforesaid ap- [7] pointment of said Harvey C. Vernon as Receiver of said Bank, and approving and confirming the aforesaid action taken by said Auditor of Public Accounts in the premises and his

acts in taking possession of said Bank and of its books, records, assets, property and effects for the purpose of the liquidation of said Bank; that said Harvey C. Vernon has ever since continued to act, and is still acting, as Receiver of said Bank, and at all times since his said appointment has proceeded, and is now proceeding, with the administration and liquidation of said Bank under and in accordance with the said banking law of Illinois.

XI.

That since the close of business on the 22nd day of June, 1932, said Bank has wholly ceased to do business for which it was organized, and since said last mentioned date the said banking corporation has been and now is wholly insolvent, and all of its property has been in the custody either of said Auditor of Public Accounts or of said Receivers, respectively, so that on and since the 23rd day of June, 1932, the liabilities of said Bank have been due without any demand or notice.

XII.

That each of the defendants hereinabove named was a stockholder of said Woodlawn Trust and Savings Bank, and was the owner and holder of those certain numbers of shares of stock in said Bank hereinafter set forth following their respective names, during the respective periods hereinafter in this paragraph set forth; that during said respective periods of time during which each of said defendants was a stockholder as aforesaid,

divers sums amounting to the respective totals hereinafter in this paragraph set forth accrued and became due and owing to the creditors of said Bank, including these plaintiffs, constituting liabilities of said bank, [8] all of which said sums are still due and owing to said creditors, including these plaintiffs, from said Woodlawn Trust and Savings Bank, no part of which has been paid by said Bank or by any of its stockholders, or by these defendants, or any of them, as follows, to-wit:

Charles M. Pusey held 5 shares of stock from May 2, 1905 to November 26, 1918 during which period unsatisfied liabilities accrued in the total sum of \$5,294.13.

Siegfried Schulein, Junior held 2 shares of stock from December 8, 1910 to February 19, 1917 during which period unsatisfied liabilities accrued in the total sum of \$2,883.64; and said defendant also held 10 shares of stock from December 9, 1914 to February 19, 1917 during which period unsatisfied liabilities accrued in the total sum of \$1,873.85.

Siegfried Schulein held 12 shares of stock from February 19, 1917 to June 22, 1932, during which period unsatisfied liabilities accrued in the total sum of \$2,085,389.33; said defendant also held 3 shares of stock from January 10, 1919 to June 22, 1932 during which period unsatisfied liabilities accrued in the total sum of \$2,082,670.05; said defendant also held 9 shares of stock from December 27, 1920 to June 22, 1932 during which period unsatisfied

liabilities accrued in the total sum of \$2,076,591.41; said defendant also held 6 shares of stock from January 22, 1924 to June 22, 1932 during which period unsatisfied liabilities accrued in the total sum of \$2,040,872.80; and said defendant also held 6 shares of stock from February 1, 1927 to June 22, 1932 during which period unsatisfied liabilities accrued in the total sum of \$1,981,453.12.

William Forsstrom held 30 shares of stock from October 8, 1927 to June 22, 1932 during which period unsatisfied liabilities accrued in the total sum of \$1,956,206.98.

Grace Appleton McKey held 307 shares of stock from March 14, 1917 to June 22, 1932 during which period unsatisfied liabilities [9] accrued in the total sum of \$2,085,342.86; said defendant also held 40 shares of stock from January 10, 1919 to April 13, 1920 during which period unsatisfied liabilities accrued in the total sum of \$3,787.14; said defendant also held 36 shares of stock from January 10, 1919 to June 22, 1932 during which period unsatisfied liabilities accrued in the total sum of \$2,082,670.05; said defendant also held 1 share of stock from January 21, 1919 to June 22, 1932 during which period unsatisfied liabilities accrued in the total sum of \$2,082,631.23; said defendant also held 100 shares of stock from December 27, 1920 to December 13, 1921 during which period unsatisfied liabilities accrued in the total sum of \$6,717.87; said defendant also held 106 shares of stock from December 27, 1920 to June 22, 1932 during which

period unsatisfied liabilities accrued in the total sum of \$2,076,591.41; said defendant also held 1 share of stock from January 16, 1924 to January 5, 1925 during which period unsatisfied liabilities accrued in the total sum of \$16,229.17; said defendant also held 24 shares of stock from January 16, 1924 to April 26, 1927 during which period unsatisfied liabilities accrued in the total sum of \$63,974.83; said defendant also held 25 shares of stock from January 16, 1924 to November 20, 1925 during which period unsatisfied liabilities accrued in the total sum of \$28,435.36; said defendant also held 20 shares of stock from January 16, 1924 to June 22, 1932 during which period unsatisfied liabilities accrued in the total sum of \$2,041,080.55; said defendant also held 5 shares of stock from January 16, 1924 to September 8, 1926 during which period unsatisfied liabilities accrued in the total sum of \$47,279.60; said defendant also held 10 shares of stock from January 16, 1924 to May 19, 1925 during which period unsatisfied liabilities accrued in the total sum of \$20,717.44; said defendant [10] also held 1 share of stock from January 16, 1924 to April 26, 1927 during which period unsatisfied liabilities accrued in the total sum of \$63,974.83; said defendant also held 14 shares of stock from January 16, 1924 to June 22, 1932 during which period unsatisfied liabilities accrued in the total sum of \$2,041,080.55; and said defendant also held 98 shares of stock from February 1, 1927 to September 18, 1928 during which period unsatisfied liabilities accrued in the total sum of \$81,978.93.

E. E. Frick held 10 shares of stock from April 7, 1910 to June 22, 1932 during which period unsatisfied liabilities accrued in the total sum of \$2,008,473.60; said defendant also held 2 shares of stock from January 10, 1919 to June 22, 1932 during which period unsatisfied liabilities accrued in the total sum of \$2,082,670.05; said defendant also held 1 share of stock from February 10, 1919 to June 22, 1932 during which period unsatisfied liabilities accrued in the total sum of \$2,082,594.09; said defendant also held 7 shares of stock from December 27, 1920 to June 22, 1932 during which period unsatisfied liabilities accrued in the total sum of \$2,076,591.41; said defendant also held 5 shares of stock from January 21, 1924 to June 22, 1932 during which period unsatisfied liabilities accrued in the total sum of \$2,040,953.50; and said defendant also held 5 shares of stock from January 24, 1927 to June 22, 1932 during which period unsatisfied liabilities accrued in the total sum of \$1,982,318.38.

Erma A. La Noue held 1 share of stock from October 2, 1923 to June 22, 1932 during which period unsatisfied liabilities accrued in the total sum of \$2,046,670.35.

Mark M. Baker held 3 shares of stock from October 24, 1927 to June 22, 1932 during which period unsatisfied liabilities accrued in the total sum of \$1,955,366.13. [11]

Erma M. Aszman held 1 share of stock from December 16, 1921 to October 2, 1923 during which period unsatisfied liabilities accrued in the total sum of \$23,020.87.

Leone B. Hill held 10 shares of stock from September 29, 1916 to September 25, 1925 during which period unsatisfied liabilities accrued in the total sum of \$70,575.58; said defendant also held 2 shares of stock from January 10, 1919 to September 25, 1925 during which period unsatisfied liabilities accrued in the total sum of \$67,489.42; said defendant also held 1 share of stock from December 27, 1920 to February 14, 1921 during which period unsatisfied liabilities accrued in the total sum of \$1,001.54; and said defendant also held 6 shares of stock from December 27, 1920 to September 25, 1925 during which period unsatisfied liabilities accrued in the total sum of \$61,410.78.

Mrs. L. E. Hill held 10 shares of stock from May 28, 1909 to October 18, 1911 during which period unsatisfied liabilities accrued in the total sum of \$565.99.

Kathryn Riddell held 4 shares of stock from February 1, 1927 to August 30, 1927 during which period unsatisfied liabilities accrued in the total sum of \$19,528.53.

XIII.

That said separate sums of indebtedness of said Bank, aggregating the amounts aforesaid, constitute liabilities of said Bank which severally accrued to said respective creditors thereof, including these plaintiffs, while the defendants hereinabove named were and remained such stockholders as aforesaid, and all said liabilities were and are evidenced by pass books or bank books or certificates of deposit or other evidences of indebtedness in

writing, and for which liabilities said defendants are liable to said creditors in whose behalf this suit is brought, including [12] these plaintiffs, in respective amounts up to the par value of the shares of the capital stock of said Woodlawn Trust and Savings Bank held by said defendants, respectively, as aforesaid, while said respective liabilities accrued, and said liabilities of said defendants arose and exist by virtue of the provisions of Article XI, Section 6, of the Constitution of the State of Illinois, which is hereinabove set forth, and Chapter 16a, Section 6, of the Illinois State Bar Statutes which provides as follows:

“Every stockholder in any bank or banking association organized under the provisions of this Act shall be individually responsible and liable to its creditors, over and above the amount of stock by him or her held to an amount equal to his or her respective shares so held, for all its liabilities accruing while he or she remains such stockholder. It is hereby made the duty of the president and cashier, within thirty days after organization, to file in the office of the recorder of deeds of the county in which such bank is located, a certified list of all the original stockholders, giving the number of shares of stock held by each, and thereafter a certificate of all transfer of stock, not later than ten days after such transfer. No transfer of stock shall operate as a release of liability provided in this section.”

and Chapter 16a, Section 11 of the Illinois State Bar Statutes which provides as follows:

“When any banking association, organized under this Act shall have gone into liquidation under the provisions of this section of the Act, the individual liability of the shareholders provided for by section six (6) of this Act may be enforced by any creditor of such association, by bill in equity, in the nature of a creditor’s bill, brought by such creditor on behalf of himself and all other creditors of the association against the shareholders thereof, in any court having jurisdiction in equity for the county in which such bank or banking association may have been located or established.

“The Court in which suit is instituted may appoint a receiver and require of him such bond and security as seems proper for the purpose of collecting, receiving, and disbursing the amounts due from the stockholders on account of their ownership of the stock of said Bank. Said receiver shall have authority upon the order of the court appointing him to employ such auditors and assistants as may be necessary to establish and recover the liabilities of [13] the stockholders, and may, with the approval of the court enter into compositions with insolvent stockholders, if any. The costs of such proceedings, including reasonable solicitor’s fees for complainants’ solicitors, and other necessary expenses of collection, may on the order of court, be paid out of the funds col-

lected by said receiver. The funds so collected, after the payment of the costs and expenses of collection, including solicitors' fees, shall be distributed according to law among the creditors of said bank in such manner as the court shall direct."

and the Illinois cases, interpreting said sections, which are to the following effect: Under the law of the State of Illinois as stated by its Supreme and Appellate Courts, the constitutional provision above referred to is self-executing and is a part of every banking act. A stockholder is primarily liable for the debts of the bank accruing during his ownership of the stock and continues so liable until such liabilities are paid or otherwise discharged. The liability of the stockholder is limited to the amount of the par value of the stock he held, or to the amount of liabilities accruing during the period he held his stock and still unpaid, whichever is lower. The obligation is contractual and primary in its nature, and is not penal. The stockholders are not mere sureties; they are in reality **principals and are** individually and personally liable to all creditors of the bank, and are answerable as original and principal debtors, owing the same debt as the bank owes. The stockholders' Liability is in the nature of a fund which is security for the common benefit of the bank's creditors. All the creditors may join and all the stockholders may be joined in a single suit, or one or more of the creditors may proceed against one or part of the stockholders without

joining all. The latter suit is a suit in equity. When one creditor sues on behalf of all other creditors, all creditors are before the Court and are equally bound by the Decree. The existence of the stockholders' liability does not depend upon the ascertainment of the existence [14] or extent of a deficiency of the bank's assets to pay creditors. Nor is a creditor obliged to delay bringing suit against the stockholders of a closed bank until the general assets of the bank have been distributed and a deficiency established, for the reason that the liability of the stockholder is definitely fixed by law as primary, direct and contractual. The liability of the stockholder may be enforced immediately upon the closing of the bank. The cause of action arises upon demand made by a creditor upon the bank to pay, and the bank's failure to do so. When a bank is closed for liquidation no demand is necessary inasmuch as it would be a useless act. The officers or agents of the bank, in making written entries in the bank's records, act as the agents and representatives, not only of the bank, but of the stockholders, regarded as unincorporated partners, and the written evidence of indebtedness is as binding upon the stockholders as upon the bank. The books and records of the bank are competent evidence against the stockholders without proof of their correctness. Where the original books are voluminous, they need not be received in evidence, but can be tendered to the opposite party for inspection and examination. Where the effect to be proved is the general result of an examination of the whole col-

lection, evidence may be given as to such result by any competent person who has examined them, providing the result is capable of being ascertained by calculation. In calculating the accruals of liabilities during the time the stockholder held his stock, the rule applied in Illinois is that it is the sum first paid in that is first drawn out; the first item on the debit side that is discharged by the first item on the credit side. In applying the above rule, it has been held that it is necessary to examine the deposit account of each depositor, ascertain the balance due him at the time the bank suspended, and [15] the dates on which the liabilities of the bank or the amount listed by such final balance accrued; which is done by beginning with the depositor's last deposit and adding thereto enough prior deposits to make up the amount of the final deposit balance. A stockholder has no right to set off any sum due him from the bank against his stock liability since the debts are owed to different parties.

XIV.

That on said 22nd day of June, 1932, said Woodlawn Trust and Savings Bank was indebted to these respective plaintiffs in the respective sums hereinafter in this paragraph stated, by reason of moneys deposited by or on behalf of said respective plaintiffs in savings deposit accounts in said Bank to their respective credit, and remaining on deposit in said Bank and not withdrawn; that the various and sundry amounts each of said plaintiffs so deposited, which remained on deposit as aforesaid.

and the respective dates on which each of said deposits were so made, are as follows, to-wit:

James W. Butler and Mary L. Butler deposited the following amounts on the following dates, to their joint and several credit, to-wit:

\$ 378.55	on	January 11, 1932
\$ 60.00	on	January 18, 1932

Mary Seguin deposited the following amounts on the following dates, to-wit:

\$ 156.00	on	Decemer 19, 1931
\$ 62.55	on	April 11, 1932

Clara Verschoor deposited the following amounts on the following dates, to-wit:

\$ 110.24	on	November 15, 1921
\$ 125.00	on	January 21, 1925

[16]

Lillian Fitzgerald deposited the following amounts on the following dates, to-wit:

\$1,100.00	on	December 2, 1931
\$ 2.75	on	January 1, 1932
\$ 104.82	on	May 10, 1932

David J. Lewis and Elizabeth A. Lewis deposited the following amounts on the following dates, to their joint and several credit, to-wit:

\$ 507.00	on	December 12, 1931
\$ 130.75	on	January 4, 1932

John Lingie Smith and Ella Ruth Smith deposited the following amount on the following date, to their joint and several credit, to-wit:

\$ 300.00	on	December 18, 1931
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Patrick J. Leonard and Annie Leonard deposited the following amounts on the following dates, to their joint and several credit, to-wit:

\$ 300.00	on	January 8, 1932
\$ 100.00	on	January 29, 1932
\$ 516.63	on	April 18, 1932
\$ 83.37	on	May 11, 1932

Stephen C. Perry deposited the following amounts on the following dates, to-wit:

\$ 149.32	on	December 7, 1931
\$.42	on	January 1, 1932
\$ 69.73	on	April 12, 1932
\$ 10.00	on	May 20, 1932
\$ 10.00	on	June 20, 1932

Carle Hillebrand and Mrs. C. C. E. Hillebrand deposited the following amounts on the following dates, to their joint and several credit, to-wit:

\$ 180.00	on	December 4, 1931
\$ 1.56	on	January 1, 1932
\$ 40.00	on	February 23, 1932

Fred Hussey deposited the following amount on the fol- [17] lowing date, to-wit:

\$ 245.17	on	May 20, 1932
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Mrs. H. L. Gooch deposited the following amounts on the following dates, to-wit:

\$ 14.34	on	July 1, 1924
\$ 60.00	on	November 13, 1924
\$ 25.00	on	December 11, 1924
\$ 50.00	on	December 24, 1924
\$ 15.15	on	January 1, 1925
\$ 25.00	on	February 3, 1925
\$ 60.00	on	February 7, 1925
\$ 20.00	on	February 17, 1925
\$ 25.00	on	March 24, 1925

\$ 55.00	on	April 14, 1925
\$ 20.00	on	April 28, 1925
\$ 40.00	on	May 21, 1925
\$ 15.12	on	July 1, 1925
\$ 25.00	on	August 22, 1925
\$ 50.00	on	September 15, 1925

Oscar Swanson deposited the following amounts on the following dates, to-wit:

\$ 11.23	on	August 2, 1924
\$ 50.00	on	September 2, 1924
\$ 40.00	on	October 6, 1924
\$ 15.65	on	January 1, 1925
\$ 111.32	on	February 17, 1925
\$ 17.85	on	July 1, 1925

Marvin Walter Wafer deposited the following amounts on the following dates, to-wit:

\$ 648.16	on	March 9, 1925
\$ 6.48	on	July 1, 1925

George W. Irvine deposited the following amounts on the following dates, to-wit:

\$ 836.63	on	March 19, 1924
\$ 18.54	on	July 1, 1924
\$ 81.25	on	September 15, 1924
\$ 26.87	on	January 1, 1925
\$ 16.25	on	January 19, 1925
\$ 32.50	on	February 16, 1925
\$ 28.10	on	July 1, 1925

Betty Du Bois deposited the following amounts on the following dates, to-wit: [18]

\$ 97.50	on	November 23, 1931
\$.24	on	January 1, 1932

Mrs. I. B. Brawley deposited the following amount on the following date, to-wit:

\$ 52.87	on	June 14, 1932
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Margaret Johnstone deposited the following amounts on the following dates, to-wit:

\$ 687.39	on	June 13, 1927
\$ 10.39	on	July 1, 1927

James J. Phelan deposited the following amounts on the following dates, to-wit:

\$ 157.56	on	June 16, 1927
\$ 105.90	on	June 27, 1927
\$ 27.39	on	July 1, 1927
\$ 1.95	on	July 1, 1927
\$ 50.00	on	July 22, 1927
\$ 50.00	on	August 3, 1927
\$ 15.00	on	August 16, 1927

J. H. Pegram and Mrs. J. H. Pegram deposited the following amounts on the following dates, to their joint and several credit, to-wit:

\$ 50.00	on	November 11, 1908
\$ 30.00	on	September 8, 1909

Marie C. Knief deposited the following amounts on the following dates, to-wit:

\$ 40.00	on	May 15, 1909
\$ 40.00	on	September 21, 1909
\$ 20.00	on	December 3, 1909
\$ 30.00	on	April 8, 1910
\$ 20.00	on	September 3, 1910
\$ 20.00	on	October 4, 1910
\$ 25.00	on	November 4, 1910
\$ 30.00	on	May 11, 1911
\$ 40.00	on	March 2, 1911
\$ 25.00	on	January 4, 1912
\$ 25.00	on	March 6, 1912
\$ 25.00	on	May 11, 1912
\$ 30.00	on	March 4, 1913
\$ 30.00	on	January 8, 1913

Amos Washington deposited the following amounts on the following dates, to-wit:

\$ 50.00	on	October 19, 1910
\$ 20.00	on	October 4, 1910
\$ 25.00	on	August 7, 1911
\$ 40.00	on	July 19, 1913

Dorothy Lewitz deposited \$50.00 on the 23rd day of June, 1913.

Marie C. Cross and Violette M. Cross deposited the following amounts on the following dates, to their joint and several credit, to-wit:

\$ 132.61	on	April 26, 1930
\$ 100.00	on	July 18, 1929
\$ 292.00	on	January 14, 1929
\$ 125.00	on	July 14, 1925
\$ 250.00	on	December 30, 1924
\$ 130.00	on	August 14, 1924
\$ 250.00	on	December 30, 1924
\$ 130.00	on	August 14, 1924
\$ 125.00	on	July 14, 1925
\$ 70.00	on	January 15, 1925

Charles L. Forsberg deposited the following amounts on the following dates, to-wit:

\$ 135.00	on	November 12, 1925
\$ 80.00	on	September 20, 1927
\$ 105.00	on	August 20, 1927
\$ 135.00	on	July 30, 1927
\$ 170.00	on	July 11, 1927

Madge McNaul deposited \$109.28 on the 2nd day of August, 1920.

XV.

That said amount of indebtedness, in the instance of these plaintiffs, was on the 22nd day of June, 1932, and still is, over and above all set-offs

and counterclaims which said Bank had or might have had against said plaintiffs respectively; that said sums of money were deposited by these plaintiffs, and the liabilities of said Bank to said plaintiffs accrued, together with the [20] liabilities of said Bank for the similar indebtedness of said Bank to its said other creditors, from time to time while the defendants herein-named were such stockholders as aforesaid; that no part of said indebtedness to these plaintiffs has ever been paid to any of these plaintiffs by said Bank or by said defendants or any of them, or by any of the other stockholders of said Bank, and said indebtedness to these respective plaintiffs constitute liabilities of said Bank for which the said stockholders, including these defendants, are liable under and by virtue of the provision of the Illinois Constitution hereinabove referred to.

XVI.

That pursuant to the provisions of said Illinois banking laws, more particularly Chapter 16a, Section 11 of the Illinois State Bar Statutes which is hereinabove set forth, acting in accordance with the authority expressly conferred therein, said Harvey C. Vernon, Receiver appointed for said Bank as aforesaid, heretofore duly employed auditors, who were properly qualified and certified public accountants, to examine the books and records and affairs of said Bank and to establish the respective liabilities of the stockholders thereof, including the stockholders' liability of these defendants; that thereafter said auditors made a complete and

proper audit and examination of said books, records and affairs of said Bank and thereby established the liabilities of said stockholders, including that of these defendants, whereby the respective stockholders' liability of each of these defendants was found and established to be in the respective amounts hereinafter stated; that thereafter said audit, establishing the respective liabilities of the stockholders of said Bank, including that of these defendants, was duly proved and established in proceedings duly held and conducted for that purpose before a Master [21] in Chancery who had been theretofore duly appointed by the Circuit Court of Cook County in those certain proceedings then and now pending before said Court, being the same proceedings in which said Receiver was appointed as is hereinabove more particularly stated, namely, in that certain suit in equity, numbered 560059, entitled "Stella M. Murphy, et al, Plaintiffs, vs. Woodlawn Trust and Savings Bank, an Illinois banking corporation, et al, Defendants"; that the defendants herein at all of the times herein mentioned were named and designated as parties defendant in said last mentioned suit; that thereafter said Master in Chancery duly reported to said Circuit Court of Cook County, in said proceedings, the said audit so proved before him as aforesaid; that said Circuit Court thereupon duly made and rendered and caused to be filed its judgment and decree in said proceedings approving, ratifying, and confirming the said report of said Master and the said audit; that during all of the various and sundry

times while defendants were stockholders in said Bank as aforesaid, Chapter 16a, Section 11 of the Illinois State Bar Statutes as hereinabove quoted was and remained a part of the banking law in full force and effect in said State of Illinois; that by reason of the foregoing facts and circumstances, and by virtue of said last mentioned judgment and decree of said Circuit Court of Cook County which ratified, approved and confirmed the said audit so made as aforesaid, the respective liabilities of each of these defendants as stockholders of said Bank became and now is fixed and established in the amounts hereinafter set forth opposite their respective names as follows, to-wit: The liability of Charles M. Pusey was and is \$500.00; the liability of Siegfried Schulein, Junior, was and is \$1,200.00; the liability of Siegfried Schulein was and is \$3,600.00; the liability of William Forsstrom was and is \$3,000.00; the liability of Grace [22] Appleton McKey was and is \$75,305.01; the liability of E. E. Fricke was and is \$3,000.00; the liability of Erma A. La Noue was and is \$100.00; the liability of Mark M. Baker was and is \$300.00; the liability of Erma M. Aszman was and is \$100.00; the liability of Leone B. Hill was and is \$1,900.00; the liability of Mrs. L. E. Hill was and is \$565.99; and the liability of Kathryn Riddell was and is \$400.00.

XVII.

That the unsatisfied liabilities of said Woodlawn Trust and Savings Bank to its creditors, including these plaintiffs, which accrued during the respective

periods designated in Paragraph XII, as established and determined by said audit and said judgment and decree of said Circuit Court of Cook County, amounts to the sums stated in said last mentioned Paragraph; that by reason of the premises and of the facts and circumstances hereinabove stated and by virtue of the provisions of the Constitution of the State of Illinois hereinabove quoted, each of the defendants herein is liable to the plaintiffs herein as creditors of said Bank in the sums stated in the last Paragraph hereinabove set forth.

Wherefore, plaintiffs pray judgment against the defendants herein in the respective amounts hereinabove set forth or in such other amounts as the Court may find them liable, respectively, together with interest thereon at the rate of 7% per annum from the 23rd day of June, 1932, and together with their costs of suit incurred herein; that the Clerk of this Court be instructed and directed to issue duplicate writs or subpoenas against such of the defendants herein as may reside in other Districts contained in the State of California, directed to the respective Marshals of such other Districts; and that plaintiffs may have such other [23] and further or different relief as may be meet and proper in the premises.

DINKELSPIEL & DINKEL-
SPIEL

Attorneys for Plaintiffs.

United States of America,
State of California,
City and County of San Francisco—ss.

Martin J. Dinkelspiel, being first duly sworn, deposes and says:

That he is a member of the law firm of Dinkelspiel & Dinkelspiel, attorneys for plaintiffs in the foregoing action named; that as such he is duly authorized to make and does make this verification for and on behalf of said plaintiffs; that the reason affiant makes this verification is that said plaintiffs reside outside and are absent from the City and County of San Francisco, State of California, wherein affiant and said attorneys have their offices; that affiant has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge excepting as to such matters as are therein stated on information or belief; and that as to those matters he believes it to be true.

MARTIN J. DINKELSPIEL

Subscribed and sworn to before me this 18th day of November, 1936.

[Seal]

LOUIS WIENER

Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Nov. 19, 1936 [24]

District Court of the United States
Northern District of California
Southern Division

MD No. 22414 Civil. Received Nov. 19, 1936. U. S.
Marshal's Office, San Francisco, Calif.

No. 4103-R

In Equity

SUBPOENA AD RESPONDENDUM

The President of the United States of America
To Charles M. Pusey; Siegfried Schulein, Junior;
Siegfried Schulein; William Forsstrom; Grace
Appleton McKey; E. E. Fricke; Erma A. La
Noue; Mark M. Baker; Erma M. Aszman;
Leone B. Hill; Mrs. L. E. Hill; and Kathryn
Riddell; Defendants,

Greeting:

You Are Hereby Commanded, that you be and
appear in the Southern Division of the United
States District Court for the Northern District of
California, aforesaid, at the Court Room in the
City of San Francisco, within twenty days after
service hereof, to answer a Bill of Complaint ex-
hibited against you in said Court by James W.
Butler; Mary L. Butler; Mary Seguin; Clara Ver-
schoor; Lillian Fitzgerald; David J. Lewis; Eliza-
beth A. Lewis; John Lingie Smith; Ella Ruth Smith;
Patrick J. Leonard; Annie Leonard; Stephen C.
Perry; Carle Hillebrand; Mrs. C. C. E. Hillebrand;
Fred Hussey; Mrs. H. L. Gooch; Oscar Swanson;

Marvin Walter Wafer; George W. Irvine; Betty Du Bois; Mrs. I. B. Brawley; Margaret Johnstone; James J. Phelan; J. H. Pegram; Mrs. J. H. Pegram; Marie C. Knief; Amos Washington; Dorothy Lewitz; Marie C. Cross; Violette M. Cross; Charles L. Forsberg; and Madge McNaul; Plaintiffs, who are citizens of the State of Illinois and to do and receive what the said Court shall have considered in that behalf.

Witness, the Honorable Michael J. Roche, Judge of said District Court, this 19th day of November in the year of our Lord one thousand nine hundred and thirty-six and of our Independence the 161st.

[Seal]

WALTER B. MALING

Clerk.

By J. P. WELSH

Deputy Clerk.

Memorandum pursuant to Rule 12, rules of practice
for the Courts of Equity of the United States

You are Hereby Required to file your answer or other defense in the above suit on or before the twentieth day after service, excluding the day thereof, of this subpoena, at the Clerk's Office of said Court, pursuant to said Bill: otherwise the said Bill may be taken pro confesso.

WALTER B. MALING

Clerk

By J. P. WELSH

Deputy Clerk.

[Endorsed]: Filed Nov. 27, 1936. [25]

RETURN ON SERVICE OF WRIT

United States of America,
Northern District of Calif.—ss.

I hereby certify and return that I served the annexed Subpoena in Equity on the therein-named Charles M. Pusey, together with copy of complaint, by handing to and leaving a true and correct copy thereof with Charles M. Pusey at Oakland, in said District on the 20th day of November, 1936.

GEORGE VICE

U. S. Marshal

By J. R. CUNNINGHAM

Deputy [25-A]

District Court of the United States
Northern District of California
Southern Division

No. 4103-R.

In Equity

SUBPOENA AD RESPONDENDUM

The President of the United States of America
To Charles M. Pusey, Siegfried Schulein, Junior;
Siegfried Schulein; William Forsstrom, Grace
Appleton McKey; E. E. Fricke; Erma A. La
Noue; Mark M. Baker; Erma M. Aszman;
Leone B. Hill; Mrs. L. E. Hill; and Kathryn
Riddell; Defendants,

Greeting:

You Are Hereby Commanded, that you be and appear in the Southern Division of the United States District Court for the Northern District of California, aforesaid, at the Court Room in the City of San Francisco, within twenty days after service hereof, to answer a Bill of Complaint exhibited against you in said Court by James W. Butler; Mary L. Butler; Mary Seguin; Clara Verschoor; Lillian Fitzgerald; David J. Lewis; Elizabeth A. Lewis; John Lingie Smith; Ella Ruth Smith; Patrick J. Leonard; Annie Leonard; Stephen C. Perry; Carle Hillebrand; Mrs. C. C. E. Hillebrand; Fred Hussey; Mrs. H. L. Gooch; Oscar Swanson; Marvin Walter Wafer; George W. Irvine; Betty Du Bois; Mrs. I. B. Brawley; Margaret Johnstone; James J. Phelan; J. H. Pegram; Mrs. J. H. Pegram; Marie C. Knief; Amos Washington; Dorothy Lewitz; Marie C. Cross; Violette M. Cross; Charles L. Forsberg; and Madge McNaul; Plaintiffs, who are citizens of the State of Illinois and to do and receive what the said Court shall have considered in that behalf.

Witness, the Honorable Michael J. Roche, Judge of said District Court, this 19th day of November in the year of our Lord one thousand nine hundred and thirty-six and of our Independence the 161st.

[Seal]

WALTER B. MALING,

Clerk.

By J. P. WELSH

Deputy Clerk.

MEMORANDUM PURSUANT TO RULE 12,
RULES OF PRACTICE FOR THE COURTS
OF EQUITY OF THE UNITED STATES.

You Are Hereby Required to file your answer or other defense in the above suit on or before the twentieth day after service, excluding the day thereof, of this subpoena, at the Clerk's Office of said Court, pursuant to said Bill: otherwise the said Bill may be taken Pro Confesso.

WALTER B. MALING

Clerk.

By J. P. WELSH

Deputy Clerk.

[Endorsed]: Filed Mar. 15, 1937. [26]

The undersigned, Walter B. Maling, as Clerk of the United States District Court for the Northern District of California, hereby certifies that the within duplicate subpoena ad respondendum is a true and correct copy of the writ issued out of said Court this date in the within entitled action.

[Seal]

WALTER B. MALING,

Clerk

By J. P. WELSH

Deputy Clerk

Southern District of California, ss.

I hereby certify and return, that on the 30th day of November, 1936 I received the within Subpoena in Equity and that after diligent search, I am un-

able to find the within-named defendant, Grace Appleton McKey within my district.

ROBERT E. CLARK

United States Marshal.

By FLOYD S. KEARNS

Deputy United States Marshal. [27]

Sou. District of California, ss.

I hereby certify and return, that on the 10th day of Feb., 1937 I received the within Subpoena and that after diligent search, I am unable to find the within-named defendant Grace Appleton McKey within my district.

ROBERT E. CLARK

United States Marshal.

By F. L. BESSER

Deputy United States Marshal. [28]

So. District of Cal., ss.

I hereby certify and return, that on the 16 day of Dec., 1936 I received the within Summons and that after diligent search, I am unable to find the within-named defendant Grace *Apelton* McKey within my district.

ROBERT E. CLARK

United States Marshal.

By J. P. LAVELLE

Deputy United States Marshal. [29]

Southern District of California, ss.

I hereby certify and return, that on the 2nd day of December, 1936 I received the within Subpoena and that after diligent search, I am unable to find the within-named defendant William Forsstrom within my district.

ROBERT E. CLARK

United States Marshal

By THOS. H. LYMING

Deputy United States Marshal. [30]

So. District of Cal., ss.

I hereby certify and return, that on the 1st day of Dec. 1936 I received the within Writ and that after diligent search, I am unable to find the within-named defendant Erma M. Aszman within my district.

ROBERT E. CLARK

United States Marshal.

By J. B. BROOKE

Deputy United States Marshal. [31]

United States Marshal's Office
Southern District California

I Hereby Certify and Return, that I received the within writ on the 4th day of February, 1937, and personally served the same on the 9th day of February, 1937, on Ernest E. Fricke by delivering to and leaving with Mrs. Ernest E. Fricke an adult

person, who is a member or resident in the family of Ernest E. Fricke, said defendant named therein, at Los Angeles, County of Los Angeles in said District, an attested copy thereof, at the dwelling house or usual place of abode of said Ernest E. Fricke, one of said defendants herein.

Los Angeles, California, February 9th, 1937.

ROBERT E. CLARK,

U. S. Marshal.

By FLOYD S. KEARNS

Deputy. [32]

United States Marshal's Office
Southern District of California

I Hereby Certify and Return, that I received the within writ on the 9th day of January, 1937, and personally served the same on the 9th day of January, 1937, on Erma A. La Noue, by delivering to and leaving with R. G. La Noue, an adult person, who is a member or resident in the family of Erma A. La Noue, said defendant named therein, at Los Angeles, County of Los Angeles, in said District, an attested copy thereof, at the dwelling house or usual place of abode of said Erma A. La Noue, one of said defendants herein.

Los Angeles, California, January 9th, 1937.

ROBERT E. CLARK,

U. S. Marshal.

By GEO. V. ROSSINI

Deputy. [33]

RETURN ON SERVICE OF WRIT

United States of America,
So. District of Cal.—ss.

I hereby certify and return that I served the annexed Subpoena on the therein-named Mark M. Baker by handing to and leaving a true and correct copy thereof with him personally at Los Angeles in said District on the 2nd day of Dec., 1936.

ROBERT E. CLARK

U. S. Marshal

By J. B. BROOKE

Deputy. [34]

RETURN ON SERVICE OF WRIT

United States of America,
So. District of Cal.—ss.

I hereby certify and return that I served the annexed subpoena on the therein-named Mrs. Leone B. Hill by handing to and leaving a true and correct copy thereof with her personally at Glendale in said District on the 3rd day of Dec., 1936.

ROBERT E. CLARK

U. S. Marshal.

By J. B. BROOKE

Deputy. [35]

RETURN ON SERVICE OF WRIT

United States of America,
Southern District of Calif.—ss.

I hereby certify and return that I served the

annexed Subpoena in Equity on the therein-named Kathryn Riddell by handing to and leaving a true and correct copy thereof with Kathryn Riddell personally at Hermosa Beach, Calif. in said District on the 11th day of Dec., 1936.

ROBERT E. CLARK,

U. S. Marshal.

By FLOYD S. KEARNS

Deputy. [36]

In the District Court of the United States

Northern District of California

Southern Division

Issued Subpoena

No. 4103R

JAMES W. BUTLER, et al.,

Plaintiffs,

vs.

CHARLES M. PUSEY, et al.,

Defendants.

PRAECIPE

To the Clerk of Said Court:

Sir: Please issue Alias Subpoena Ad Respondendum in the above-entitled case against defendants Siegfried Schulein, Junior; Siegfried Schulein; William Forsstrom; Grace Appleton McKey; and Erma A. Aszman.

Previous subpoenas issued in said action have heretofore been returned not executed as to said defendants.

This request is made pursuant to Equity Rule No. 14.

3/15/37.

(Sgd.) DINKELSPIEL & DINKELSPIEL
Attorneys for Plaintiffs.

[Endorsed]: Filed Mar. 15, 1937. [37]

[Title of Court and Cause.]

ORDER DESIGNATING AND APPOINTING
PERSON OTHER THAN MARSHALL TO
SERVE PROCESS.

It appearing to the satisfaction of the Court that, after diligent search, the United States Marshall for the Southern District of California has been unable to effect service of the supoena ad respondendum upon certain of the defendants in the above-entitled action, namely, Siegfried Schulein, Junior; Siegfried Schulein, William Forsstrom, Grace Appleton McKey and Emma A. Aszman; and good cause appearing therefor, now, on motion of Dinkelspiel & Dinkelspiel, attorneys for plaintiffs in the above-entitled action, it is hereby:

Ordered that Leo K. Gold, an adult person, of Los Angeles, California, be, and he hereby is, ap-

pointed and designated as the person to serve said subpoena ad respondendum upon said defendants hereinabove named, as well as such alias or other subpoenas as may have been or may hereafter be issued in the above-entitled suit against the said defendants or any of them.

Dated: At San Francisco, California, March 15, 1937.

A. F. ST. SURE

United States District Judge.

[Endorsed]: Filed Mar. 15, 1937. [38]

[Title of District Court and Cause.]

SUMMONS IN A CIVIL ACTION

To the above named Defendant: Grace Appleton
McKey:

You are hereby summoned and required to serve
upon

DINKELSPIEL & DINKELSPIEL
plaintiff's attorney, whose address is:

Dinkelspiel & Dinkelspiel

Attorneys at Law

333 Montgomery Street

San Francisco

California

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken

against you for the relief demanded in the complaint.

[Seal]

WALTER B. MALING

Clerk of Court.

By B. E. O'HARA

Deputy Clerk.

Date: January 16, 1939.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[Endorsed]: Filed Apr. 14, 1939. [39]

[Title of District Court and Cause.]

MOTION FOR ORDER FOR PUBLICATION
OF SUMMONS UPON DEFENDANT
GRACE APPLETON McKEY.

Now come the plaintiffs in the above-entitled suit, by their attorneys, Messrs. Dinkelspiel & Dinkelspiel, and move the Court that an order be made and granted in said cause that service of summons on defendant Grace Appleton McKey be made by publication, and that by its order the Court or Judge designate "The Los Angeles Daily Journal" as the newspaper most likely to give notice to said defendant, and direct that publication of the aforesaid summons be made in said newspaper once each calendar week for two months; and for such other further, and/or different [40] relief as may be meet and proper in the premises.

Said motion will be made upon the ground that defendant Grace Appleton McKey cannot, after due diligence, be found within the State of California or within the jurisdiction of this Court, and on the ground that said defendant has been and now is concealing herself to avoid the service of summons and/or other process in this action; that a cause of action exists against said defendant in favor of plaintiffs, and that she is a necessary and proper party to the above-entitled suit; and that service of summons by publication as herein requested is the manner prescribed by the law of the State of California, which is the State in which the service is to be made, for the service of summons in an action brought in the courts of general jurisdiction of that State, in cases of this sort.

This motion is based upon this writing, upon the verified complaint on file herein, upon the affidavit of Fred S. Herrington being filed and presented herewith, upon the records of the above-entitled cause, and upon such other evidence and proof as may be adduced or offered upon the hearing of this motion.

Dated, January 16th, 1939.

DINKELSPIEL & DINKELSPIEL

Attorneys for Plaintiffs.

[Endorsed]: Filed Jan. 16, 1939. [41]

[Title of District Court and Cause.]

AFFIDAVIT FOR ORDER FOR PUBLICA-
TION OF SUMMONS

State of California,
City and County of San Francisco—ss.

Fred S. Herrington, being first duly sworn, deposes and says:

That he at all times herein mentioned has been and now is an attorney at law, and has been and is associated with the law firm of Dinkelspiel & Dinkelspiel, attorneys for plaintiffs in the above entitled stockholders' liability suit; and that he makes this affidavit for and on behalf of said plaintiffs, for the reason that said plaintiffs reside outside the state of [42] California, and for the further reason that the facts herein stated are within affiant's knowledge, affiant having been attending to the legal and other matters pertaining to said suit for and on behalf of said firm.

That the verified complaint in the above-entitled suit was filed with the Clerk of the above-entitled Court on the 19th day of November, 1936, and subpoena ad respondendum was thereupon issued thereon directly to each and all of the defendants named in said action, including defendant Grace Appleton McKey.

That as is more particularly set forth in the said complaint, to which reference is hereby made, said action is one to recover the statutory stockholders' liabilities of defendants as stockholders of the now insolvent Woodlawn Trust and Savings Bank of

Chicago, Illinois; that defendant Grace Appleton McKey held 307 shares of stock in said bank; and shortly before said suit was commenced affiant was advised by the Chicago attorneys representing the receiver for said bank, that the books and records of the Bank showed that Grace Appleton McKey resided at 1550 North Fairfax Avenue, Hollywood, California; that upon issuance of said subpoena, and on November 27, 1936, affiant mailed the original subpoena together with copy thereof and copy of the complaint in said action to Robert E. Clark, the United States Marshal at Los Angeles, California, with written instructions to serve the same upon said defendant Grace Appleton McKey at the address aforesaid; that thereafter, on or about December 16, 1936, said Marshal wrote plaintiffs' said attorneys that he could not find defendant Grace Appleton McKey, hereinafter referred to as "said defendant", at the above address but that he had ascertained that she received her mail at 119 Twenty-fourth Street, Hermosa Beach, California, at which last mentioned address another of the [43] defendants, namely, Kathryn Riddell resided; and that on attempting to serve said defendant at said last address he was advised that she was not there and he could not ascertain exactly where she was supposed to be; said Marshal in said letter suggested leaving the subpoena with said Kathryn Riddell as and for service on said defendant.

That when said suit was filed plaintiffs' said attorneys employed a private investigator of Los Angeles, namely, Leo K. Gold, Esq., who is an attorney

at law, to verify the addresses of the various defendants in said action, many of whom resided in or about Los Angeles, and also to determine as much information as possible regarding the financial status and condition of said defendants, including defendant Grace Appleton McKey; that on or about December 14, 1936, affiant was advised by said investigator that said defendant had moved from No. 1550 North Fairfax Avenue, Hollywood, to 116 South Clybourne Street, Burbank, California; and affiant immediately, on said date, wrote said Marshal advising him of the change of address, and requesting that attempt be made to serve said defendant thereat; that said investigator also reported to affiant that said defendant was a housewife residing at said Burbank address.

That on December 21, 1936, affiant wrote said Marshal giving him the foregoing information and again requesting that an attempt be made to serve said defendant thereat.

That at said time said investigator also reported to affiant that said defendant had been sued as a defendant in a Superior Court action in Los Angeles and had apparently been served in said action and had appeared therein and had obtained a dismissal with prejudice dismissing said action as of July 2, 1935. [44]

That on or about January 27, 1937, said Marshal wrote affiant that he had made several attempts, by three different Deputy Marshals, to serve said defendant at 111 and 116 South Clybourne Street, Burbank, California, and also at 119 Twenty-fourth

Street, Hermosa Beach, California, and also at 1550 Fairfax Avenue, Hollywood, California and that persons at these premises always advised that the defendant did not reside there or was away and refused further information concerning her whereabouts; said Marshal also stated that he was attempting to serve said defendant in another action for some Los Angeles attorneys.

That affiant has been informed by said investigator employed as aforesaid, and believes and therefore alleges, that defendant Grace Appleton McKey and defendant Kathryn Riddell are sisters-in-law; that said Marshal served defendant Kathryn Riddell with subpoena in this action on December 11, 1936, at the aforesaid Hermosa Beach address; that affiant is informed and believes and therefore alleges the fact to be that defendant Grace Appleton McKey learned of the pendency of this suit through her said sister-in-law, and anticipating that she would be served as a defendant therein at all times has been and now is attempting to evade service of subpoena and has been and now is concealing herself to avoid service of subpoena and/or other process in said action.

That thereafter, on or about February 1, 1937, affiant wrote said Marshal to make further attempts to serve said defendant with said subpoena: and on February 26, 1937, said Marshal wrote plaintiffs' said attorneys advising that he had not yet been able to effect service on said defendant, but that he had "definitely established that she is residing at the ad- [45] dress known as 119 Twenty-fourth

Street, Hermosa Beach'', and that it had just been within a few days prior to that date that she had established said fact and that his deputy had made three different trips, two in the morning, and one late at night but that no one responded or answered the door on the calls; that thereafter, on March 5, 1937, said Marshal wrote said attorneys that his efforts to serve said defendant had been unsuccessful and he believed it advisable to return the subpoena to the Clerk with an affidavit showing his inability to serve said defendant; and said Marshal suggested that the Court appoint a private person in Los Angeles to make the service, and said Marshal suggested and recommended that said Leo K. Gold, the investigator, be designated for that purpose inasmuch as he had co-operated with the Marshal's office and assisted the Marshal in many ways in locating the various defendants in this action.

That the original subpoena was returned to and filed with the Clerk at or about said last mentioned time, and reference is hereby made to the same for further particulars and to the Marshal's return affixed thereto.

That thereafter, on March 15, 1937, on motion of plaintiffs, an order was duly made in the above-entitled court by the Honorable A. F. St. Sure, United States District Judge, designating and appointing said Leo K. Gold, of Los Angeles, as the person to serve said subpoena ad respondendum as well as any alias or other subpoena on said defendant; that said order was filed with the Clerk on said

date, and reference to the same is hereby made for further particulars.

That inasmuch as the original subpoena had been returned and filed as aforesaid, an alias subpoena was duly issued by the Clerk in the above-entitled matter, at the request of [46] plaintiffs, on March 15, 1937, directed to the said defendants.

That thereafter, on March 16, 1937, said alias subpoena, together with copies thereof and copies of the complaint, were mailed to said Leo K. Gold at Los Angeles with instructions to serve same on said defendant either personally or by leaving a copy of the subpoena and complaint with said Kathryn Riddell with whom and at whose dwelling house said defendant was supposed to reside, all in accordance with Equity Rule No. 13, as it then read.

That under date of April 1, 1937, said Leo K. Gold acknowledged receipt of said alias subpoena and reported to affiant that he was endeavoring to serve the same on said defendant at the various addresses hereinabove set forth. He also reported that he had interviewed Mr. Marvin Wick, the postmaster at Hermosa Beach who had advised him that Kathryn Riddell received mail at the Hermosa Beach Post Office; and further that an examination of the registry of voters at Hermosa Beach, disclosed that said Kathryn Riddell was a registered voter at that place. He further reported that he was reasonably certain that said defendant was residing with said Kathryn Riddell, and that inquiries made at Hermosa Beach indicated that Kathryn Riddell and said defendant were then residing,

temporarily at least, at 1550 Fairfax Avenue, Hollywood. He stated that on March 31, 1937, he called at said last mentioned address in the evening and observed lights burning inside the house, and rang the doorbell but was unable to get any response thereto.

That on April 5, 1937, said Leo K. Gold wrote affiant advising that he had made further attempts to serve defendant and also to contact said Kathryn Riddell, at the aforesaid Fairfax Avenue address, without success, but that inquiries made by him [47] from other persons in the neighborhood of said address indicated that said defendant did live there, and further established that Kathryn Riddell and said defendant were related, either as sisters or sisters-in-law.

That on April 27, 1937, said Leo K. Gold wrote affiant advising that he had recently made a call at the aforesaid Hermosa Beach address and spoke to a woman who presumably lived there who stated to him that she was renting the place as a tenant, from said defendant McKey. He also reported at said time that he had made two additional trips to the Fairfax Avenue address without finding said defendant at home.

That on June 25, 1937, said Leo K. Gold again wrote affiant reporting that on June 15, 1937, he had again visited the Fairfax Avenue address and had found no one at home although he waited three hours in the vicinity in anticipation of someone returning home. He also advised there was no telephone listed at said address and that further in-

quiries amongst the neighbors disclosed no additional information concerning the defendant. He further advised that he had examined the Los Angeles City Directories for a number of years back and found that same listed Grace Appleton McKey as residing at 1550 Fairfax Avenue, Hollywood. He further reported that he had talked with a member of the firm of attorneys who had represented said Grace Appleton McKey in the Superior Court action hereinabove mentioned, but said attorneys advised they had not seen or heard from said defendant since said action was dismissed, and said attorneys advise him that the last address they had for her was the aforesaid address in Burbank, California.

That on September 14, 1937, said Leo K. Gold wrote affiant that he was still continuing his efforts to serve said [48] alias subpoena on the said defendant and also to locate said Kathryn Riddell with whom said defendant was supposed to be living. He stated that further investigation then indicated with reasonable certainty that said parties were then residing at the address 116 South Clybourne Street, Burbank, California, and that an attempt on his part to obtain the telephone number at said address disclosed that it was a confidential unlisted number.

That on September 24, 1937, said Leo K. Gold again wrote affiant that he had called at the Hermosa Beach address and found the same locked up and had waited around the vicinity for about two hours without anyone appearing at the address. He also reported that inquiries made at the

tax collector's office disclosed that said Kathryn Riddell had instructed the tax collector to send her the tax bills on the Hermosa Beach property and also on the Burbank property, although said properties were recorded in the name of an Elizabeth Gordon. Said investigator stated that he believed the name Elizabeth Gordon to be an alias name used by said Kathryn Riddell as a cover-up.

That on November 6, 1937, said Leo K. Gold again wrote affiant reporting that during the previous week he had called at the Burbank address aforesaid but was unable to find anyone at home there or at least that no one answered the doorbell. He further stated that the U. S. Marshal at Los Angeles had recently telephoned him stating he desired the assistance of said investigator in locating Kathryn Riddell for purpose of enabling the Marshal to serve her in another action pending in the District Court in Los Angeles, for some other attorneys.

That on November 19, 1937, said Leo K. Gold again wrote affiant reporting that inquiry made at the post office at Hermosa Beach disclosed that Kathryn Riddell maintained a post [49] office box at said post office and received mail there. He also stated that he had made several additional attempts to locate said defendant and said Kathryn Riddell at the Burbank address aforesaid, to serve said defendant, without success, and that on one occasion while he was waiting in the vicinity of said premises in the evening he had to explain his presence to the local police. He also reported that he

had consulted the latest tax records at Burbank and found therefrom that the said Burbank premises, at 116 Clybourne Street, were assessed to said Kathryn Riddell.

That in or about December, 1937, affiant learned that the law firm of Meserve, Mumper, Hughes and Robertson with offices at 555 South Flower Street, Los Angeles, were attorneys for certain plaintiffs in a suit then pending in the United States District Court at Los Angeles in which Grace Appleton McKey was a defendant, and that said attorneys were endeavoring to effect service of process in said action upon said defendant; that affiant wrote said firm to inquire concerning the same, and in reply received a letter dated December 11, 1937, from said attorneys saying that they had made numerous attempts to effect service of process on said defendant, unsuccessfully; that a Deputy United States Marshal had made several trips to the aforesaid Hermosa Beach address and also to the aforesaid Burbank address without successfully contacting or serving said defendant; and also that they had sent out their office clerks on a number of different occasions to said addresses to locate said defendant. Said attorneys promised to advise affiant if and when they were successful in serving or locating said defendant, but affiant has heard nothing further from them in that connection.

That on January 11, 1938, said Leo K. Gold wrote affiant saying that he had recently learned that Kathryn Riddell was [50] the reputed owner of

premises located at 1257 North Formosa Street, Los Angeles, and that he had called at this address and spoke with a person presumably residing there who stated his name was Max Zifkin and who further stated to said investigator that he rented said property from Mrs. Kathryn Riddell who resided at Hermosa Beach and that he periodically sent the rent checks to said Riddell.

That on or about August 2, 1938, affiant wrote said Leo K. Gold and suggested that to assist in locating the defendant he call at the law office of Meserve, Mumper, Hughes and Robertson in Los Angeles to inquire of said attorneys if they had had any better success in locating or serving said defendant in the action they were handling as aforesaid; that in response to said letter, said Leo K. Gold wrote affiant on August 19, 1938, saying that he had called on said attorneys as requested by affiant but that they were still trying to locate and serve said defendant. In said letter, said investigator further reported that he had completely recovered the ground covered during the past year in attempting to locate said defendant and also said Kathryn Riddell and had called at the various addresses aforesaid and had also searched and rechecked the city and telephone directories and the newly compiled voters' register without finding any additional or other clues as to the whereabouts of said parties or without locating said parties themselves or either of them.

That in view of the foregoing affiant and plaintiffs' attorneys have decided it would be futile to

spend further time, effort and money in an attempt to effect personal service of process on said defendant; that said defendant, Grace Appleton McKey, cannot, after due diligence, be found within the State of California, and cannot be personally served with subpoena or other pro- [51] cess in this suit; that affiant is informed and believes and therefore alleges the fact to be that said defendant at all times since the commencement of this action has been and now is concealing herself to avoid the service of subpoena and other process herein, and that she will continue to so conceal herself for the purpose aforesaid; that affiant and said attorneys have made a diligent search for said defendant and have made inquiries of each and every person whom they could expect, or had any reason to believe they would receive, information as to the whereabouts of said defendant; that affiant and said attorneys do not know the present whereabouts of said defendant and cannot learn her present whereabouts, excepting that they are informed and believe and therefore allege the fact to be that she is residing somewhere within the State of California and within the jurisdiction of this court.

That affiant is informed and believes and therefore alleges the fact to be that there has not been filed by said defendant or on her behalf, in the City and County of San Francisco, State of California, where said action was brought and is pending, a certificate of residence as provided by section 1163 of the Civil Code of California.

That the "The Los Angeles Daily Journal" is a newspaper of general circulation, published daily, except Sundays, in the County of Los Angeles, State of California; that a publication of said subpoena ad respondendum or a summons in said newspaper is most likely to give notice to said defendant.

That sections 412 and 413 of the California Code of Civil Procedure provide that where a person on whom service is to be made cannot, after due diligence, be found within the State of California, or conceals himself or herself to avoid the service of summons, a court or a judge or a justice in any court of general jurisdiction in California may make an order that service of such process on such defendant be made by the publication of the summons; and that the order must direct the publication to be made in a newspaper to be named and designated as most likely to give notice to the person to be served and for such length of time as may be deemed reasonable, at least once each calendar week.

That this suit was and is brought to recover the sum of \$81,978.93 from defendant Grace Appleton McKey which said sum was and is due and owing from her to the plaintiffs and other creditors of said Woodlawn Trust and Savings Bank, upon her statutory liability as a stockholder of said bank; that the cause of action against said defendant is more particularly set forth in plaintiffs' verified complaint on file herein to which reference is hereby made for further particulars and which, by this

reference, is hereby made a part hereof; that a cause of action at all times has existed and now exists against defendant Grace Appleton McKey, which said cause of action is particularly set forth in plaintiffs' verified complaint on file herein to which reference is hereby made for further particulars and which, by this reference, is hereby made a part hereof; that said defendant is a necessary and proper party to the above-entitled suit.

Wherefore, affiant, on behalf of said plaintiffs and on behalf of the said attorneys for plaintiffs, prays that this Court make its order directing that service of said summons on defendant, Grace Appleton McKey, be made by publication, and that by its order the Court designate said "The Los Angeles Daily Journal" as the newspaper most likely to give notice to said defendant, and direct that publication of the aforesaid [53] summons be made in said newspaper once each calendar week for two months.

FRED S. HERRINGTON.

Subscribed and sworn to before me this 14th day of January, 1939.

[Seal] MARK E. LEVY,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Jan. 16, 1939. [54]

[Title of District Court and Cause.]

ORDER FOR PUBLICATION OF SUMMONS

Upon the motion of plaintiffs in the above-entitled suit, by Messrs. Dinkelspiel & Dinkelspiel, attorneys for said plaintiffs, and it appearing to the satisfaction of the Judge from the affidavit of Fred S. Herrington, filed herein this day, and from the verified complaint on file in this suit, that a cause of action exists against the defendants herein, including defendant Grace Appleton McKey, and in favor of the plaintiffs;

And it further appearing to the satisfaction of the Judge from said affidavit and from other evidence, and the Court finds, that a subpoena ad respondendum, and also an alias subpoena [55] ad respondendum, has been duly issued out of this Court in this cause, and that a summons has also been issued out of this Court in this cause, and that diligent search has been made for said defendant Grace Appleton McKey in the State of California and within the jurisdiction of this Court in order to serve said subpoena and said alias subpoena upon her, and that the said defendant cannot, after due diligence, be found within the State of California or the jurisdiction of this Court, and that said defendant has been and now is concealing herself to avoid the service of said process; that personal service of summons or other process cannot be made upon said defendant, and that summons in this suit should be served by publication;

And it further appearing that there has not been

filed on behalf of said defendant in the City and County of San Francisco, State of California, or elsewhere within the jurisdiction of this Court, where said action was brought and is pending, the certificate of residence provided for in Section 1163 of the Civil Code of the State of California; that "The Los Angeles Daily Journal" is a newspaper of general circulation, published daily, except Sundays, in the County of Los Angeles, State of California, and is the newspaper most likely to give notice of this suit to said defendant; and good cause appearing therefor:

It Is Hereby Ordered, Adjudged and Decreed, that service of the summons upon said defendant in this action be made by publication of said summons in said "The Los Angeles Daily Journal", which said newspaper is hereby designated as most likely to give notice to said defendant, Grace Appleton McKey, and that said publication be made once each calendar week for two months. Done in Open Court, this 16th of January, 1939.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed Jan. 16, 1939. [56]

[Title of District Court and Cause.]

AFFIDAVIT OF PUBLICATION
OF SUMMONS

State of California

County of Los Angeles—ss.

G. Artz, of said County and State, being duly sworn, says:

That I am and at all times herein mentioned was a citizen of the United States, over eighteen years of age, and not a party nor interested in the above entitled matter; that I am the principal clerk of the printer, publisher and proprietor of The Los Angeles Daily Journal, a newspaper printed and published daily (Sundays excepted), in the said Los Angeles County; that the Summons in the above entitled matter, of which the annexed is a printed copy, was published in said newspaper at least once a week for two months—January 24, and 31st, February 7, 14, 21, and 28th, March 7, 14, 21, and 28th, All in 1939.

G. ARTZ

Subscribed and sworn to before me, this 28th day of March, 1939.

[Seal]

WM. W. ROE

Notary Public in and for Los Angeles County,
State of California.

SUMMONS

Civil Action File No. 4103 R In Equity

District Court of the United States, for the
Northern District of California, Southern Division.

James W. Butler; Mary L. Butler; Mary Seguin; Clara Verschoor; Lillian Fitzgerald; David J. Lewis; Elizabeth A. Lewis; John Lingie Smith; Ella Ruth Smith; Patrick J. Leonard; Annie Leonard; Stephen C. Perry; Carle Hillebrand; Mrs. C. C. E. Hillebrand; Fred Hussey; Mrs. H. L. Gooch; Oscar Swanson; Marvin Walter Wafer; George W. Irvine; Betty Du Bois; Mrs. I. B. Brawley; Margaret Johnstone; James J. Phelan; J. H. Pegram; Mrs. J. H. Pegram; Marie C. Knief; Amos Washington; Dorothy Lewitz; Marie C. Cross; Violette M. Cross; Charles L. Forsberg; and Madge McNaul, Plaintiffs, vs. Charles M. Pusey; Siegfried Schulein, Junior; Siegfried Schulein; William Forsstrom; Grace Appleton McKey; E. E. Fricke; Erma A. La Noue; Mark M. Baker; Erma M. Aszman; Leone B. Hill; Mrs. L. E. Hill; and Kathryn Riddell, Defendants.

To the above named Defendant: Grace Appleton McKey.

You are hereby summoned and required to serve upon Dinkelspiel & Dinkelspiel, plaintiff's attorney, whose address is: Dinkelspiel & Dinkelspiel. Attorneys at Law, 333 Montgomery Street, San Francisco, California, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: January 16, 1939.

[Seal] WALTER B. MALING,

Clerk of the Court.

By B. E. O'HARA,

Deputy Clerk.

First publication January 24, 1939.

(772 Tues)

Reprint L. A. Daily Journal MU. 6354

[Endorsed]: Filed Apr. 14, 1939.

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of Said Court:

Sir: Please enter default for failure to plead, answer or otherwise defend against defendant Grace Appleton McKey; and thereupon please enter judgment by default in favor of plaintiffs and against defendant Grace Appleton McKey for \$110,886.63, with costs in the sum of \$43.50.

Dated: April 18, 1939.

(sgd) DINKELSPIEL &

DINKELSPIEL

Attorneys for Plaintiffs

per FRED S. HERRINGTON

[Endorsed]: Filed Apr. 18, 1939. [58]

[Title of District Court and Cause.]

AFFIDAVIT OF DEFAULT JUDGMENT

United States of America,
State of California,
City and County of San Francisco.—ss.

Fred S. Herrington, being first duly sworn, deposes and says:

That he is an attorney at law, duly entitled to practice in the above-entitled Court, and has been and now is associated with the law firm of Dinkelspiel & Dinkelspiel, attorneys for plaintiffs; that he makes this affidavit for and on behalf of said plaintiffs, and for the reason that the facts herein stated are within his knowledge or that he is familiar with said facts on account of his having handled this action. [59]

That on January 16, 1939, an order was made in the above-entitled action by the above-entitled court for the publication of summons against defendant Grace Appleton McKey; that thereafter, summons issued in said action on said last mentioned date was duly published in accordance with said order in the Los Angeles Daily Journal, for the period and in the manner required by said order; that service of said summons, by publication as aforesaid, was completed on defendant Grace Appleton McKey on March 28, 1939; that in accordance with the Rules of this Court and in accordance with said summons, said defendant had twenty days thereafter within which to plead or otherwise defend; that more than twenty days have elapsed since sum-

mons was served on said defendant as aforesaid, and said defendant has wholly failed, neglected and refused to plead or otherwise defend to the complaint of plaintiffs, and on that account, this is a proper case for the entry of a default against said defendant and for the entry of a default judgment against her as prayed for in said complaint.

That there is due, owing and unpaid from defendant Grace Appleton McKey to plaintiffs in this action, the sum of \$75,305.01 principal, together with interest thereon at 7 per cent per annum from the 23rd day of June, 1932, which said interest amounts to in excess of \$35,581.62, or a total amount due including principal and interest of \$110,886.63, together with plaintiffs' costs amounting to the sum of \$43.50, including cost of publication of summons which amounted to \$22.50, filing fee of \$15.00 and fees and expenses of U. S. Marshall at Los Angeles incurred in endeavoring to locate and serve said defendant amounting to \$6.00.

Wherefore, plaintiffs by affiant, respectfully request [60] that the Clerk of the above-entitled Court enter the default of said defendant and thereupon enter a default judgment in the amount aforesaid against said defendant.

FRED S. HERRINGTON

Subscribed and sworn to before me this 18th day of April, 1939.

[Seal]

LOUIS WIENER

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Apr. 18, 1939. [61]

[Title of District Court and Cause.]

JUDGMENT BY DEFAULT OF CLERK

The defendant Grace Appleton McKey sued herein upon her statutory liability as a stockholder in Woodlawn Trust & Savings Bank, an Illinois banking corporation, having been duly and regularly served with summons and having failed to appear, plead or otherwise defend against the complaint of plaintiffs on file herein within the time allowed by law and the said summons, which time has not been enlarged; and the default of said defendant having [62] been duly entered; upon application of plaintiff to the Clerk for judgment, and upon affidavit filed showing the amount due.

It Is Adjudged that plaintiffs above named have and recover from defendant Grace Appleton McKey the sum of \$75,305.01 principal, \$35,581.62 interest, or a total of \$110,886.63, together with costs in the sum of \$43.50.

Judgment entered April 18, 1939.

WALTER B. MALING,

Clerk of Court.

[Endorsed]: Filed Apr. 18, 1939. [63]

[Title of District Court and Cause.]

FINAL DECREE PRO CONFESSO.

Upon the motion and application of Messrs. Dinkelspiel & Dinkelspiel, attorneys for plaintiffs in the above-entitled suit; and it appearing to the

satisfaction of the Court, and the Court finds: That defendant Kathryn Riddell was duly and regularly and personally served with a subpoena ad respondendum, issued in said cause, on the 11th day of December, 1936, at the City of Hermosa Beach, State of California, as more fully appears from the return of said service made by the United States Marshal for the Southern District of California and attached to said subpoena on file with the Clerk of this Court in said cause; that said defendant has failed to answer the bill of complaint exhibited against her in said suit and has otherwise failed to appear herein within the time required by law and the said subpoena, which time has not been enlarged; that plaintiffs have heretofore elected to take an order as of course that said bill of complaint be [64] taken pro confesso against said defendant, which said order was duly made and entered in said cause on the 7th day of January, 1937; that said defendant's time to answer to said bill had expired prior to the aforesaid election of plaintiffs' and the said making and entering of said order; that plaintiffs are entitled to a decree pro confesso, absolute and final against the said defendant Kathryn Riddell; and good cause appearing therefor:

It Is Hereby Ordered, Adjudged and Decreed that plaintiffs do have and recover from the said defendant Kathryn Riddell, the sum of \$400.00 principal, together with interest thereon at the rate of 7% per annum from the 23rd day of June, 1932, in the sum of \$126.00 and together with plaintiffs'

costs of suit herein incurred amounting to the sum of \$18.88.

Dated: San Francisco, California this 30th day of March, 1937.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed Mar. 30, 1937. [65]

[Title of District Court and Cause.]

NOTICE OF MOTION

AFFIDAVIT

MEMO OF AUTHORITIES

Defendant above named, Grace Appleton McKey, appearing specially and for the purpose of this motion only, moves the court as follows:

1. To dismiss the action as to this moving defendant on the ground that it is in the wrong district, in that this moving defendant is not now and never has been an inhabitant of this district, all of which more clearly appears from the affidavit of this moving defendant, which is attached hereto as Exhibit "A".

2. To quash the service of summons upon her on the grounds:

(a) that this court having no jurisdiction over this cause as against this moving defendant, it had no jurisdiction to order or approve service of subpoena [66] or summons outside this district, which purported service as appears

from the Order of Publication issued out of this Court, was made by publication in a legal newspaper in Los Angeles, California, in the District of which this moving defendant is an inhabitant.

(b) that the order of this court directing publication of summons against this moving defendant does not comply with Section 412 of the Code of Civil Procedure of the State of California, in that the alleged facts in the affidavit of Fred S. Herrington upon which the order is based, are predicated not upon the affiant's knowledge but upon hearsay.

(c) that the order of this court directing publication of summons against this moving defendant fails to direct the depositing in the post office of a copy of the summons and complaint, directed to her at her place of residence, although as appears from the said affidavit of Fred S. Herrington, her place of residence was known.

3. To dismiss the action as to this moving defendant on the grounds:

(a) that the action is barred, as to her, by the statute of limitations applicable, to-wit: Section 337 or Section 338 of the Code of Civil Procedure of the State of California, in that it appears from the complaint that more than four (4) years elapsed between the accrual of the alleged liability and the filing of this action.

(b) that this court has no jurisdiction over the cause or causes set out in the bill of com-

plaint, in that as alleged the matter in controversy does not [67] in any cause of action alleged herein, exceed the sum of \$3000.00.

SULLIVAN, ROCHE &
JOHNSON

Attorneys for Defendant
Grace Appleton McKey
Mills Tower, San Francisco [68]

NOTICE OF MOTION

To Dinkelspiel & Dinkelspiel,
Attorneys for Plaintiff:

Please Take Notice, that the undersigned will bring the above motion on for hearing before this Court in the Court Room of Honorable Michael J. Roche, in the United States Courts and Post Office Building, San Francisco, California, on the 17th day of August, 1942, at ten o'clock a. m., or as soon thereafter as counsel may be heard.

Upon said hearing the undersigned will rely upon the files of this Court in this action, including the affidavit of Fred S. Herrington for an Order of Publication of Summons, the Order for Publication of Summons on Grace Appleton McKey, and upon the Affidavit of Grace Appleton McKey attached hereto.

SULLIVAN, ROCHE &
JOHNSON

Attorneys for defendant
Grace Appleton McKey
Mills Tower, San Francisco [69]

MEMO OF AUTHORITIES IN SUPPORT
OF MOTION

Suit must be brought in District
of defendant's residence:

Judicial Code, Section 51, amended (28
U.S.C.A. 112)

“Civil suits; arrests in; district where brought; effective period. (a) Except as provided in sections 113 to 117 of this title * * * no civil suit shall be brought in any district court against any persons by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.”

Judicial Code, Section 52, providing that where there are more than one defendant to a suit and defendants reside in different districts in the same state, the suit may be brought in either district—applies only to single suits involving several defendants with joint liability, and not to actions in which suits affecting individual liability of defendants are consolidated for sake of convenience. In such a case the cause of action against each defendant is considered a separate “suit.”

Schwed v. Smith, 1906 U. S. 188; 27 L. Ed.
156;

- Rich v. Lambert, 53 U. S. 347; 13 L. Ed. 346;
Broderick v. Amer. Gen. Corp., 71 F. (2d) 864;
Derby v. Stevens, 64 Cal. 287;
Heavlin v. Westchester Fire Ins. Co., 12 Cal. App. (2d) 695.

Service not sufficient if
court lacks jurisdiction:

Where suit is filed in the wrong district, service of summons therein does not give the court jurisdiction even though service is made in the state as provided in Rule 4 (f) [70] of Rules of Civil Procedure. That rule applies only where the court has jurisdiction.

- Rule 82—Rules of Civil Procedure;
Melekov v. Collins, 30 Fed. Suppl. 159,
(Judge McCormick)
Carby v. Greco, 31 Fed. Suppl. 251 (Ky. 1940).

Affidavit of Herrington for

Publication of Summons Insufficient:

The facts permitting service by publication must be proved by affidavit.

Section 412, Code of Civil Procedure, California.

The affiant must have personal knowledge of the facts and cannot supply them by information and belief. An order based upon an information and belief affidavit is void.

In re Behymer, 130 Cal. App. 20;

Gay v. Torrance, 145 Cal. 144;

Kahn v. Mathai, 115 Cal. 689.

Such statutes must be strictly construed because they are in derogation of the common law.

Rickelson v. Richardson, 26 Cal. 149, 152;

Col. Screw Co. v. Warner Lock Co., 138 Cal. 445;

Braley v. Seaman, 30 Cal. 610, 616;

Gage v. Riverside, 156 Fed. 1002, 1004,
(Judge Welborn).

Order of Publication

Insufficient:

The Order of Publication must direct service by mail as well as publication, where defendant's residence is known, or no jurisdiction will be obtained over defendant.

Section 413, Code of Civil Procedure,
California;

Rickelson v. Richardson, 26 Cal. 149. [71]

Court lacks jurisdiction because
amount involved below jurisdictional
amount:

The liability of an Illinois bank stockholder to a creditor of the bank is individual.

In re Cohn's Estate, 269 N. Y. S. 235;

Eames v. Davis, 102 Ill. 350;

Golden v. Cervenka, 278 Ill. 409; 116 N.
E. 273;

Babka Plastering Co. v. Chicago Bank,
264 Ill. App. 142.

The amount of individual claims of creditors against stockholders cannot be aggregated to give jurisdiction to a Federal District Court.

Broderick v. Amer. Gen. Corp. 71 Fed. (2d) 864, (4th C.C.A. 1934)

Eberhard v. Northwestern Mutual, 241 Fed. 353, (6th C. C. A.)

Appl. of Hardware Co. of Minnesota, 91 Fed. (2d) 13, (Judge Welborn)

So. Pac. v. McAdoo, 82 Fed. (2d) 121 (9th C. C. A.);

Scott v. Frazier, 253 U.S. 242; 64 L. Ed. 883, 886;

Helliker v. Grand Lodge, 112 Fed. (2d) 382 (6th C. C. A.)

Independence Corp. v. Deckert, 108 Fed. (2d) 51, (3rd C. C. A.)

Hackerer v. Guaranty Trust, 117 Fed. (2d) 95, (2nd C. C. A.)

California cases to same effect:

Johnson v. Hinkel, 29 Cal. App. 78, 87;

Meyers v. Sierra Valley Assn. 122 Cal. 669;

Emery v. Pac. 8 Cal. (2d) 663, 667;

Derby v. Stevens, 64 Cal. 287, 289.

SULLIVAN, ROCHE &
JOHNSON

Attorneys for Defendant. [72]

[Title of District Court and Cause.]

AFFIDAVIT OF GRACE APPLETON McKEY

United States of America

Northern District of California

Southern Division.—ss.

Grace Appleton McKey, being first duly sworn, deposes and says:

I am one of the defendants in the above entitled cause:

From the year 1921 to this date, I have been a resident of Los Angeles County, State of California, and have not, during any of said period resided at any place within the confines of the Northern Judicial District of California.

I have never been served with any papers in the above entitled cause, and the first knowledge I had that a judgment had been taken against me was on or about the 15th day of June, 1942.

During all of the years of residence in California, I never concealed my [73] identity from anyone. During the period from Nov. 19, 1939 to the date of the entry of said judgment I resided either at 1550 North Fairfax Avenue, Los Angeles, or at 116 South Clybourne Street, Burbank, California. During that period I was, except for occasional visits to relatives, at home most of the time. While I was at home, at either of said residences, I never refused to answer the door when anyone called. I am at present visiting in Michigan, but my home is still in Southern California.

I have fully and fairly stated the case and all of

the facts in this cause to James Farragher, an associate of the firm of Sullivan, Roche & Johnson, one of my counsel and attorneys in this case, who resides in the City and County of San Francisco, State of California, and, after such statement, I am advised by the said attorney and verily believe that I have a good and substantial defense on the merits of this cause, and to all of the purported causes of action set forth in the Bill of Complaint, and I have been further advised by said attorney that the said cause, as to me, was barred by the Statute of Limitations of the State of California, and by laches, prior to the filing of this action.

This affidavit is made in support of my motion filed herewith, to set aside as void the judgment rendered against me in the above entitled cause, the publication of summons against me in said cause, and the order for said publication of summons.

GRACE APPLETON McKEY

Subscribed and sworn to before me this 18th day of July, 1942.

[Seal]

STANLEY C. BOROWSKI

Clerk of the United States
District Court, For the West
District of Michigan.

[Endorsed]: Filed Jul. 23, 1942. [74]

[Title of District Court and Cause.]

NOTICE OF MOTION

To Grace Appleton McKey, one of the defendants herein and to Sullivan, Roche & Johnson, Attorneys for said defendant:

Please Take Notice, that the undersigned will bring the following motion on for hearing before this court in the court-room of Honorable Michael J. Roche, in the United States Courts and Post Office Building, 7th and Mission Streets, in San Francisco, California, on the 17th day of August, 1942, at the hour of 10 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard.

Plaintiffs move the court as follows:

To allow plaintiffs to file the attached affidavits of Leo K. Gold of Los Angeles, California, dated the 6th day of [75] August, 1942, and verified August 7, 1942, and the affidavit of James P. Lavelle, Deputy Marshal of the United States District Court for the Southern District of California, Central Division dated August 7, 1942 and verified the same day. Both affidavits to be filed as further evidence to show that at the time of the filing of plaintiffs' motion for an order of publication of summons herein, to wit, January 16, 1939, and at the time of the making of said Order of publication of January 16, 1939, all requirements prescribed by law for the Order of Publication of Summons were present and complied with.

Dated: August 10th, 1942.

DINKELSPIEL & DINKELSPIEL,
Attorneys for Plaintiffs.

POINTS AND AUTHORITIES.

Rule IV (h) of the rules of Civil Procedure for
the District Court of the United States:

City of Salinas v. Luke Kow Lee, 217 Cal.
252;

Bley v. Dessin, 31 Cal. App. (2d) 338;

Re Spiers 32 Cal. App. (2d) 124;

Alpha Stores Ltd. v. You Bet Min. Co.
18 Cal. App. (2d) 252;

Herman v. Santee, 103 Cal. 519.

Receipt of a copy of the within Notice of Mo-
tion is hereby acknowledged this 10th day of Au-
gust, 1942.

SULLIVAN, ROCHE &
JOHNSON

Attorneys for Defendant

Grace Appleton McKey. [76]

[Title of District Court and Cause.]

AFFIDAVIT OF LEO K. GOLD

State of California

County of Los Angeles—ss.

Leo K. Gold, being first duly sworn, deposes and says:

That he is an attorney at law duly admitted to practice in all of the courts of the State of California.

That on or about the 1st day of December, 1936, your affiant was requested by Dinkelspiel & Dinkelspiel, Esqs., attorneys for the plaintiff herein, to verify the addresses [77] of the various defendants in the above entitled action, many of whom resided in and about Los Angeles, California, and among the defendants included in said inquiry was one Grace Appleton McKey. The address given for the said Grace Appleton McKey was 1550 North Fairfax Avenue, Hollywood, California. That on or about the 10th day of December, 1936, your affiant went to 1550 North Fairfax Avenue, Hollywood, California, where he saw a neighbor at the next house and he inquired of the neighbor whether or not "Grace McKey" and Kathryn Riddell lived in that house, indicating 1550 North Fairfax Avenue, Hollywood, California. The man whom your affiant saw stated that said parties had moved from there and did not live there and that he did not know where they now lived and that new people had moved in. Nevertheless, your affiant went to the door and knocked, but no one answered.

That at or about the same time your affiant checked the records of suits in the Superior Court of Los Angeles County in an endeavor to ascertain the whereabouts of Grace Appleton McKey. Your affiant discovered a suit, No. 340,448, in the Superior Court of Los Angeles County, State of California, which was a suit brought by E. Clem Wilson, assignee of Meyer & Holler.

The suit was instituted May 12, 1932, and it was a suit wherein forty defendants were involved, one of which was Grace Appleton McKey. Each defendant was being sued for his proportionate shareholders' liability. The file disclosed that a writ of attachment was issued, but there was no return on the attachment. The file also indicated that on June 21, 1935, Grace Appleton McKey, a defendant in that action who is also a defendant in the above entitled action, was represented by Fleming & Robbins, Esqs., with offices in the Los Angeles Stock Exchange Building, 639 South Spring Street, Los Angeles, California. The [78] file further disclosed that she was given a dismissal with prejudice as of July 2, 1935. Said attorneys were in the same office building with your affiant and your affiant was acquainted with a law clerk employed by said attorneys, and your affiant requested said law clerk, whose name he does not recall, to ascertain the address of a client of the office, Grace Appleton McKey. That on or about the 14th day of December, 1936, the said law clerk advised your affiant that the last address known to said attorneys was 116 South Clybourne, Burbank, Cali-

fornia, and accordingly, on or about the 14th day of December, 1936, your affiant advised the attorneys for the plaintiff herein that Grace Appleton McKey did not reside at 1550 North Fairfax Avenue, Hollywood, California, which was the address given by them to him for purposes of investigation, but in truth and in fact the said Grace Appleton McKey was residing at 116 South Clybourne, Burbank, California.

That on or about the 10th day of March, 1937, your affiant advised the attorneys for the plaintiff herein that in view of their statement that the marshal was unsuccessful in serving the said Grace Appleton McKey at 116 South Clybourne, Burbank, California, that it would be satisfactory with him if an order of the United States District Court for the Northern District of California be made naming affiant as the party to make service upon the defendant Grace Appleton McKey.

That thereafter, on or about the 17th day of March, 1937, your affiant was informed by the attorneys for the plaintiff herein that they had obtained an order by the United States District Court Judge in the above entitled action designating him as a party to make service of the alias subpoena on the defendant Grace Appleton McKey. Your affiant also received, in addition to said alias subpoena, a copy of the subpoena and [79] complaint for service upon the defendant Grace Appleton McKey.

That on or about the 15th day of March, 1937, your affiant went to 116 South Clybourne, Bur-

bank, California, bearing with him the original alias subpoena, together with a copy of the complaint and subpoena to be served upon the defendant Grace Appleton McKey. That at that time and place he saw two persons who advised your affiant, after inquiry made by him concerning the whereabouts of Grace Appleton McKey, that they did not know of such party's living there or having lived there; that said persons told your affiant that they were tenants of said premises and did not know who owned the premises; that said persons stated to your affiant that they had never heard of either Grace Appleton McKey or Kathryn Riddell, whom your affiant at that time believed to be the sister-in-law of the said Grace Appleton McKey.

On or about the 31st day of March, 1937, bearing with him the original alias subpoena, together with the copy of the complaint and subpoena for service upon Grace Appleton McKey, your affiant went to Hermosa Beach, California, and at about 7:30 A. M. of said day knocked on the door of that certain bungalow at 119 24th Street, Hermosa Beach, California. There was no response, and your affiant waited for several hours, at all times observing the premises. Immediately thereafter, your affiant went to the local postoffice at Hermosa Beach, California, where he interviewed Marvin Wick, the Postmaster, and who advised him that Kathryn Riddell, who resided at 119 24th Street, Hermosa Beach, California, received her mail at a postoffice box in the Hermosa Beach postoffice; that he did not know

her personally and that he did not know, nor had he ever heard of Grace Appleton McKey. [80]

That thereafter, your affiant returned to said bungalow at 119 24th Street, Hermosa Beach, California, and again knocked at the door, but there was no response. Thereafter your affiant returned to Los Angeles, California, and stopped off at 1550 North Fairfax Avenue, Hollywood, California, in the evening of said day, to-wit, March 31, 1937, at or about 9:00 P. M. Your affiant observed that the house was illuminated, indicating occupancy, but when your affiant knocked on said door at said place no one answered.

That thereafter, your affiant walked back and forth in front of said house to observe whether there were any persons in there, but nobody appeared.

That the next day, to-wit, April 1, 1937, your affiant again returned to 1550 North Fairfax Avenue, Hollywood, California, and he was advised by a different neighbor that "Grace McKey" did not live there. Nevertheless, your affiant again knocked on said door, but no one answered. That between April 15 and April 27, 1937, your affiant made two visits to said address 1550 North Fairfax Avenue, Hollywood, California, and still another neighbor advised him that new people had moved in there and that as far as he knew, there was no "Grace McKey" living there or around there.

That the reason that your affiant made continuous visits to said address at 1550 North Fairfax Avenue, Hollywood, California, was to ascertain from the tenants therein whether in truth and in

fact the said Grace Appleton McKey had moved to 116 South Clybourne, Burbank, California, and to discover from neighbors to what address the said Grace Appleton McKey had moved.

Your affiant, having been unsuccessful in locating [81] the defendant Grace Appleton McKey at 1550 North Fairfax Avenue, Hollywood, California, at 116 South Clybourne, Burbank, California, or at 119 24th Street, Hermosa Beach, California, personally typed a dummy letter, the original of which is attached to this affidavit and marked Exhibit "A" and incorporated herein by reference. Said letter was sent Registered Mail, Return Receipt Requested, with the further request that the postoffice designate the address where delivered. That said letter was addressed to Mrs. Grace Appleton McKey, 116 South Clybourne, Burbank, California, and was duly deposited in the Post Office at Los Angeles, California, at the Metropolitan Station, Los Angeles, California, with postage prepaid. That thereafter your affiant received the return of said letter with the following marks and notations: "Returned to writer, unclaimed", together with a striking out of the address 116 South Clybourne, Burbank, California, and the superimposition of the address 119 24th Street, Hermosa Beach, California, and the carrier's initials, which appear to be "9H" and a notation "Not at". That said letter carried your affiant's name and his then address, 901 Continental Building, Los Angeles, to which said letter was returned.

That on or about the 15th day of June, 1937,

your affiant again returned to 1550 North Fairfax Avenue, Hollywood, California, and waited there several hours for someone to appear after he had approached the door and knocked thereon. He saw some persons passing by into the houses in said block who, after inquiry, stated that they did not know "Grace McKey"; that there were new people living in the house, and that they did not know that a person of that name had ever resided at 1550 North Fairfax Avenue, Hollywood, California. [82]

That your affiant attempted to ascertain the telephone listing at 1550 North Fairfax Avenue, Hollywood, California, during the period of his visits there. He ascertained that there was no telephone listed at said address.

That on or about the 10th day of September, 1937, your affiant ascertained the confidential telephone number at 116 South Clybourne, Burbank, California, which was Burbank 2779-J, and the person answering the telephone stated that she had never heard of Mrs. Riddell or Mrs. McKey and that she did not know of any such person living at that address. That your affiant checked the then current telephone directories, and city directories for the years 1936, 1937 and 1938 during the time that he made his investigation, but his investigation disclosed no listing for Grace Appleton McKey.

That your affiant has read the affidavit of Fred S. Herrington in support of an application for an order for publication of summons, and that the matters stated therein as pertains to the efforts

of your affiant to locate and serve the defendant Grace Appleton McKey are true and correct.

Dated: At Los Angeles, California, this 6th day of August, 1942.

LEO K. GOLD

Subscribed and sworn to before me this 7th day of August, 1942.

[Seal] FLORA SETTLES,

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires March 7, 1943. [83]

EXHIBIT A



MAY 17 1937

119-2474
Herman Beck
74

Mrs. Grace A. McKey
416 South Clybourne
Burbank, California

REGISTERED

355318

RECEIVED
MAY 17 1937
U.S. MAIL DELIVERED

Leo K. Gold
901 Continental Building
Los Angeles, California



[Title of District Court and Cause.]

AFFIDAVIT OF JAMES P. LAVELLE

State of California,
County of Los Angeles—ss.

James P. Lavelle, being first duly sworn, deposes and says:

That he is and at all times hereinafter mentioned was a deputy attached to the United States District Court for the Southern District, Central Division; that on or about the 16th day of December, 1936, he was instructed, in connection with his duties as said marshal, to serve a copy of the complaint in [85] the above entitled matter, together with a copy of a subpoena, upon the defendant Grace Appleton McKey; that on or about the said 16th day of December, 1936, bearing the original subpoena and a copy of the complaint and subpoena, your affiant went to 116 South Clybourne, Burbank, California, where he attempted to serve the defendant Grace Appleton McKey; that although he made an attempt to effect such service, he was unable to locate the defendant Grace Appleton McKey for such purpose after the exercise of due diligence on his part.

Dated: At Los Angeles, California, this 7 day of August, 1942.

JAMES P. LAVELLE

Subscribed and sworn to before me this 7 day of August, 1942.

LEONARD B. LYONS

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Nov. 24, 1943.

[Endorsed]: Filed Aug. 10, 1942. [86]

In the Southern Division of the United States District Court for the Northern District of California.

No. 4103R

In Equity

JAMES W. BUTLER; MARY L. BUTLER;
MARY SEGUIN; CLARA VERSCHOOR;
LILLIAN FITZGERALD; DAVID J.
LEWIS; ELIZABETH A. LEWIS; JOHN
LINGIE SMITH; ELLA RUTH SMITH;
PATRICK J. LEONARD; ANNIE LEON-
ARD; STEPHEN C. PERRY; CARLE HIL-
LEBRAND; MRS. C. C. E. HILLEBRAND;
FRED HUSSEY; MRS. H. L. GOOCH; OS-
CAR SWANSON; MARVIN WALTER WA-
FER; GEORGE W. IRVINE; BETTY DU
BOIS; MRS. I. B. BRAWLEY; MARGARET
JOHNSTONE; JAMES J. PHELAN; J. H.
PEGRAM; MRS. J. H. PEGRAM; MARIE
C. KNIEF; AMOS WASHINGTON; DORO-

THY LEWITZ; MARIE C. CROSS; VIOLETTE M. CROSS; CHARLES L. FORSBERG; and MADGE McNAUL;

Plaintiffs,

vs.

CHARLES M. PUSEY; SIEGFRIED SCHULEIN, JUNIOR; SIEGFRIED SCHULEIN; WILLIAM FORSSTROM; GRACE APPLETON McKEY; E. E. FRICKE; ERMA A. LANOUÉ; MARK M. BAKER; ERMA M. ASZMAN; LEONE B. HILL; MRS. L. E. HILL; and KATHRYN RIDDELL;

Defendants.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND PLAINTIFFS' MOTION TO FILE AFFIDAVITS; GRANTING MOTION TO QUASH SERVICE OF SUMMONS AND SETTING ASIDE DEFAULT JUDGMENT.

Ordered that defendant Grace Appleton McKey's motion to dismiss the within action be, and the same is hereby Denied; that plaintiffs' motion to file affidavits of Leo K. Gold and James P. Lavelle be, and the same is hereby Denied; that said defendant's motion to quash service of summons upon her be, and the same is hereby Granted; that the judgment by default by the Clerk of this court entered herein against said defendant on April 18, 1939, be, and the same is hereby Vacated, and that said defendant be given thirty (30) days from

the date hereof within which to answer the complaint on file herein.

Dated: December 4, 1942.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed Dec. 5, 1942. [87]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given, that the plaintiffs above named hereby appeal to the Circuit Court of Appeals for the Ninth Circuit, from the order of the District Court of the United [88] States, Northern District of California, Southern Division, entered in this action on December 5, 1942 to the effect that the above named plaintiffs' Motion to file affidavits of Leo K. Gold and James F. Lavelle be denied; that said defendant, Grace Appleton McKey's Motion to quash service of summons upon her be granted; that the judgment by default of the Clerk of the above named District Court of the United States entered herein against said defendant on April 18, 1939, be vacated.

Dated: January 4, 1943.

DINKELSPIEL & DINKEL-
SPIEL

Attorneys for said Plaintiffs
and Appellants.

[Endorsed]: Filed Jan. 4, 1943. [89]

[Title of District Court and Cause]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

To the above-entitled Court, and to the Clerk of said Court, and to Grace Appleton McKey, and to Messrs. Sullivan, Roche and Johnson, her attorneys:

Come now James W. Butler, et al, appellants herein, and, in accordance with Rule 75 (a) of the Federal Rules of Civil Procedure, designate the following as the portions of the record, proceedings and evidence to be contained in the Record on Appeal, notice of which said appeal was heretofore filed herein on the 4th day of January, 1942, viz:

[90]

(1) Appellants' verified complaint, dated November 18, 1936;

(2) Subpoena Ad Respondendum issued to Charles M. Pusey, et al, dated November 19, 1936, with Clerk's certificate;

(3) United States Marshal's returns dated November 30, 1936, December 16, 1936, and February 10, 1937 on attempted service of the above described subpoena, on appellee, Grace Appleton McKey;

(4) United States Marshal's return on service of said subpoena on defendant Kathryn Riddell, dated December 11, 1936;

(5) United States Marshal's return on service of said subpoena on defendant Charles M. Pusey at Oakland, California, dated November 20, 1936;

(6) Praeceptum for alias subpoena and ad respondendum dated and filed March 15, 1937, with clerk's certificate showing issue of subpoena;

(7) Order designating and appointing a person other than marshal, namely Leo K. Gold, to serve process, dated March 15, 1937;

(8) Praeceptum for alias subpoena ad respondendum against appellee, filed January 16, 1939, with clerk's certificate showing issue of subpoena;

(9) Summons directed to appellee, dated January 16, 1939 and filed April 14, 1939;

(10) Motion for order for Publication of Summons upon Appellee Grace Appleton McKey, dated January 16, 1939;

(11) Affidavit of Fred S. Herrington for order for publication of summons, dated January 14, 1939 and filed [91] January 16, 1939;

(12) Order for publication of summons dated and filed January 16, 1939;

(13) Affidavit of publication of summons on appellee, filed April 14, 1939;

(14) Praeceptum for entry of default and judgment by default against appellee dated April 18, 1939;

(15) Affidavit of Fred S. Herrington for default judgment, dated and filed April 18, 1939;

(16) Judgment by default by clerk against appellee dated and filed April 18, 1939;

(17) Final decree pro confesso against defendant Kathryn Riddell, dated and filed March 30, 1937;

(18) Notice of motion of appellee, filed July 23, 1942;

(19) Affidavit of appellee, dated July 18, 1942;

(20) Appellants' notice of motion, dated and filed August 10, 1942;

(21) Affidavit of Leo K. Gold, dated August 6, 1942, and filed August 10, 1942;

(22) Affidavit of James P. Lavelle, dated August 7, 1942, and filed August 10, 1942;

(23) Order of court, dated December 4, 1942, and filed December 5, 1942.

Dated: at San Francisco, California, this 14th day of January, 1943.

Respectfully submitted,

DINKELSPIEL & DINKEL-
SPIEL

By MARTIN J. DINKELSPIEL

Attorneys for Appellants [92]

Receipt of a copy of the within Designation of Contents of Record on Appeal is hereby acknowledged this 14th day of January, 1943.

SULLIVAN, ROCHE and
JOHNSON

By MILTON D. HARRIS

Attorneys for Appellee.

[Endorsed]: Filed Jan. 14, 1943. [93]

[Title of District Court and Cause.]

STIPULATION "RE" RECORD
ON APPEAL

It Is Hereby Stipulated that Appellants' "Designation of Contents of Record on Appeal," filed in compliance with Rule 75 (a) of the Federal Rules of Civil Procedure, shall be, and the same is hereby amended by striking therefrom the following:

From designation No. 21 and designation 22, the words "and filed August 10, 1942."

The said amendment is based upon the fact that the affidavits described in said designations were not filed but are attached to Appellants' notice of motion described in designation No. 20, on which motion appellants sought leave of the Court for filing. [94]

It is further stipulated that as above corrected the documents described in appellants' said "Designation" shall constitute the record on appeal of the said cause.

Dated: January 25th, 1943.

SULLIVAN, ROCHE &
JOHNSON

Attorneys for Appellants
DINKELSPIEL & DINKEL-
SPIEL

Attorneys for Appellee

[Endorsed]: Filed Jan. 25, 1943. [95]

[Title of District Court and Cause.]

CONCISE STATEMENT OF POINTS TO BE
RELIED UPON BY APPELLANTS ON
APPEAL AND DESIGNATION OF PARTS
OF THE RECORD UNDER RULES 75
(a and d) OF THE FEDERAL RULES OF
CIVIL PROCEDURE [96]

Come now James W. Butler, et al., appellants herein, and in accordance with Rule 75 (d) of the Federal Rules of Civil Procedure, specify the following as a concise statement of the points on which said appellants intend to rely on the appeal heretofore perfected (and filed in the above entitled court) from the order made and entered by Honorable Michael J. Roche, Judge of the United States District Court for the Northern District of California, on the 5th day of December, 1942, and more particularly specified and described in the notice of such appeal dated January 4, 1943, and filed with the Clerk of said District Court on the 4th day of January, 1943, viz:

That said portion of said order of said District Judge entered in said District Court on the 5th day of December, 1942, wherein and whereby and to the extent that by said order said District Judge denied the motion of appellants herein, to file affidavits of Leo K. Gold and James P. Lavelle, granted the motion of appellee Grace Appleton McKey to quash service of summons upon her; vacated the judgment by default by the Clerk of said District Court entered herein against said appellee on April 18,

1939, was and is erroneous and contrary to law, in that:

(a) Said order herein appealed from as to that portion thereof wherein and whereby said judgment by default entered against said appellee Grace Appleton McKey, is vacated, was made in the absence of any motion of said appellee to vacate said judgment; [97]

(b) That said District Court had and has no jurisdiction upon a motion to vacate a final judgment entered in a prior term of the court if six (6) months have expired after the entry of such judgment, as is more particularly described and defined in Rules 55 and 60(b) of the Federal Rules of Civil Procedure;

(c) That even assuming the existence of such jurisdiction in the Court, there were and are no sufficient factual or legal grounds warranting the court's action in vacating said judgment;

(d) That said District Court had and has no jurisdiction to quash service of summons after the judgment by default had become final, and that even if such jurisdiction did exist there were no factual or legal grounds warranting the Court's action in quashing service of summons;

(e) That said appellee, by making her motion to dismiss the complaint herein and pleading matters concerning the merits of the case and the Court's jurisdiction of the subject matter of the complaint, and by participating in the hearing upon said motion, waived the right to have the service of summons quashed and thereby voluntarily sub-

mitted her person to the jurisdiction of said District Court;

(f) That appellants were and are entitled to file the supplementary affidavits of Leo K. Gold and James P. Lavelle in accordance with their motion, and that said affidavits eliminated all possible doubts as to the validity of the service of summons made upon the appellee.

Dated: at San Francisco, California, this 14th day of January, 1943.

Respectfully submitted,

DINKELSPIEL & DINKEL-
SPIEL

By MARTIN J. DINKELSPIEL

Attorneys for Appellants

Receipt of Service.

Receipt of a copy of the within Concise Statement of Points to be Relied Upon by Appellants on Appeal, is hereby acknowledged this 14th day of January, 1943.

SULLIVAN, ROCHE and
JOHNSON

By MILTON D. HARRIS

Attorneys for Appellee

[98-A]

[Endorsed]: Filed Jan. 14, 1943. [98]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD ON APPEAL AND DOCKETING
ACTION IN CIRCUIT COURT OF AP-
PEALS (Rule 73G)

On application of Dinkelspiel & Dinkelspiel, Attorneys for plaintiffs in the above entitled action, and good cause appearing therefor,

Now Therefore, it is Ordered, that the time of plaintiffs for filing the Record on Appeal and for docketing the above entitled action on appeal for the Circuit Court of Appeals, Ninth Circuit, in pursuance of Notice of Appeal heretofore filed by plaintiffs, be and the same is hereby extended to and including the 5th day of March, 1943.

The within Order is made upon the provisions of Rule 73 (G) in the rules of Federal Court Procedure.

Dated February 9th, 1943.

MICHAEL J. ROCHE

Judge of the United States
District Court, Northern
District of California

[Endorsed]: Filed Feb. 9, 1943. [99]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 99 pages, numbered from 1 to 99, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of James W. Butler, et al, Plaintiffs, vs. Charles M. Pusey, et al, No. 4103-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Thirteen Dollars and Eighty-Five Cents (\$13.85) and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 4th day of March A. D. 1943.

[Seal]

WALTER B. MALING

Clerk

WM. J. CROSBY

Deputy Clerk [100]

[Endorsed]: No. 10381. United States Circuit Court of Appeals for the Ninth Circuit. James W. Butler, Mary L. Butler, Mary Seguin, Clara Verschoor, Lillian Fitzgerald, David J. Lewis, Elizabeth A. Lewis, John Lingie Smith, Ella Ruth Smith, Patrick J. Leonard, Annie Leonard, Stephen C. Perry, Carle Hillebrand, Mrs. C. C. E. Hillebrand, Fred Hussey, Mrs. H. L. Gooch, Oscar Swanson, Marvin Walter Wafter, George W. Irvine, Betty Du Bois, Mrs. I. B. Brawley, Margaret Johnstone, James J. Phelan, J. H. Pegram, Mrs. J. H. Pegram, Marie C. Knief, Amos Washington, Dorothy Lewitz, Marie C. Cross, Violette M. Cross, Charles L. Forsberg and Madge McNaul, Appellants, vs. Grace Appleton McKey, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed March 5, 1943.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10381

JAMES W. BUTLER, et al,

Appellants,

vs.

GRACE APPLETON McKEY,

Appellee.

CONCISE STATEMENT OF POINTS TO BE
RELIED UPON BY APPELLANTS ON
APPEAL UNDER RULE 1916

Come now, James W. Butler, et al, appellants herein and as statement of points to be relied upon by them on their appeal herein they hereby adopt the statement of points filed by them on January 14, 1943, with the Clerk of the United States District Court for the Northern District of California, in accordance with Rule 75 (a) of the Federal Rules of the Civil Procedure.

Dated at San Francisco, California, this 16th day of February, 1943.

Respectfully submitted,

DINKELSPIEL & DINKEL-
SPIEL

By (Illegible)

Attorneys for Appellants

[Endorsed]: Filed Mar. 5, 1943. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PARTS OF RECORD
NECESSARY FOR THE CONSIDERATION
OF APPEAL UNDER RULE 1916.

Come now, James W. Butler, et al, appellants herein, and hereby designate, as the parts of the record which they think necessary for the consideration of such appeal, the entire record as contained in the transcript of said record on appeal heretofore transmitted to the Clerk of the above-entitled Court by the Clerk of the United States District Court for the Northern District of California.

Dated at San Francisco, California, this 16th day of February, 1943.

Respectfully submitted,

DINKELSPIEL & DINKELSPIEL,

By (Illegible)

Attorneys for Appellants.

[Endorsed]: Filed Mar. 5, 1943. Paul P. O'Brien, Clerk.

No. 10,381

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

JAMES W. BUTLER, et al.,

VS.

GRACE APPLETON McKEY,

Appellants,

Appellee.

OPENING BRIEF FOR APPELLANTS.

DINKELSPIEL & DINKELSPIEL,

333 Montgomery Street, San Francisco.

Attorneys for Appellants.

FILED

MAY - 3 1943

PAUL P. O'BRIEN,
CLERK



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No. 10,381

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

JAMES W. BUTLER, et al.,

Appellants,

VS.

GRACE APPLETON McKEY,

Appellee.

OPENING BRIEF FOR APPELLANTS.

JURISDICTION.

This is an appeal from that portion of the order of the District Court of the United States for the Northern District of California, Southern Division, entered on the 5th day of December, 1942 (Transcript of Record, page 91), which provides that the judgment by default by the clerk of the above-named District Court entered on April 18, 1939 be vacated, that service of summons upon Appellee be quashed and that Appellants' motion to file affidavits of Leo K. Gold and James P. Lavelle be denied.

On November 19, 1936 Appellants herein filed a complaint in the said District Court on behalf of themselves and all of the creditors of the Woodlawn Trust

and Savings Bank, a banking corporation organized under the laws of the State of Illinois. The complaint was a representative suit based upon statutory stockholders' liability against a number of defendants, including Appellee, all of whom had formerly been, or were at the time the said banking corporation became insolvent, shareholders of the above-named Woodlawn Trust and Savings Bank.

All of the plaintiffs were citizens and residents of states other than California. All of the defendants, including Appellee, were citizens and residents of the State of California at the time of the filing of the complaint. (Par. 2 of the complaint, Tr. page 4.) It is admitted that at the time of the filing of the suit Appellee was a resident of the Southern District of the State of California. (Tr. page 76.) Others of the defendants were residents of the Northern District of the State of California. (Tr. page 34.) The total amount involved in the complaint was in excess of \$3000; likewise the amount claimed in this representative suit against the Appellee individually was in excess of said jurisdictional amount. Hereafter at pages 41 et seq. we will demonstrate that the requisite jurisdictional amount was involved in this suit and that Appellee as a resident of the Southern District of the State of California could be sued in the District Court for the Northern District of the State as a co-defendant with other defendants in this suit who were residents of the Northern District.

The jurisdiction of the District Court was invoked upon diversity of citizenship, under Section 24 of the

Judicial Code; 28 U. S. C. A., Section 41. Venue as to Appellee was based on Section 52 of the Judicial Code; 28 U. S. C. A., Section 113.

The Appellate jurisdiction of this Court is invoked under Section 128(a) of the Judicial Code, 28 U. S. C. A., Section 225(a).

The order of the District Court vacating the judgment entered on April 18, 1939 was made and entered more than three years after the entry of the judgment and therefore after the expiration of the term of Court or long after the six months' period prescribed in Rules 55(c) and 60(b) of the Rules of Civil Procedure.

An order vacating a judgment after the expiration of the term of Court during which the judgment was entered, or after the six months' period above referred to, is appealable as a "final decision" under the above provision of the Judicial Code.

Phillips v. Negley, 117 U. S. 665, 29 L. ed. 1013;
Jackson v. Heiser, C. C. A. 9 (1940), 111 Fed.
 (2d) 310.

That part of the order of the District Court whereby service of summons upon Appellee was quashed is merely expressive of an element of the decision vacating the judgment. The Court apparently vacated the judgment because it considered the service of summons defective. Where the Court simultaneously quashes the service of summons and vacates the judgment which has been entered upon such service of summons, the way must be open to plaintiff to include in the

appeal from the order vacating the judgment that part of the order which quashes the service because such order, although in form an order to quash is in fact part of the final decision.

Rosenberg Bros. & Co. v. Curtis Brown Co., 260
U. S. 516, 67 L. ed. 372.

That part of the order of the District Court denying permission to Appellants to file the affidavits of the Messrs. Gold and Lavelle as supplementary proof that the prerequisites of service by publication were present and complied with, is also part of the order vacating the judgment and therefore appealable as part of such order. If the District Court had allowed Appellants to file such supplementary proof, the Court upon examination of that supplementary proof might have been fully satisfied that the facts for publication of summons were present. By denying Appellants' motion to file supplementary proof, the Court in effect made an order which formed part of its final decision to vacate the judgment. At any rate, the Court's decision denying Appellants' motion to file supplementary proof, whether in and of itself an appealable order or not, is *reviewable* upon the appeal from the order vacating the judgment.

STATEMENT OF THE CASE.

On April 18, 1939 a default judgment was entered by the clerk of the District Court against Appellee upon her statutory liability as a stockholder in the Woodlawn Trust & Savings Bank, an Illinois banking

corporation, in the sum of \$110,886.63, together with costs. (Tr. page 67.)

Subpoena could not be served upon Appellee because the United States Marshal, after diligent search, was unable to find her. (Tr. pages 36-37.) After the United States Marshal had returned the subpoena unserved, alias subpoena was issued (Tr. page 43) and upon Appellants' motion Leo K. Gold was appointed to effect service of the alias subpoena upon Appellee and other defendants. (Tr. page 42.)

In the order by which Gold was appointed to serve process, the Court said (Tr. page 42) :

“It appearing to the satisfaction of the Court that after diligent search, the United States Marshal for the Southern District of California has been unable to effect service upon certain of the defendants * * * namely * * * Grace Appleton McKey * * *.”

Leo K. Gold was also unable to serve process upon Appellee. (Tr. pages 47 et seq.) Thereupon Appellants moved for publication of subpoena upon the grounds that Appellee being a resident of the State of California, after due diligence could not be found within the State, and that Appellee concealed herself to avoid service. For proof of the facts for publication of service Appellants relied on the record and submitted an affidavit of Fred S. Herrington, one of the attorneys for Appellants.

The Court, upon Appellants' motion, made an order for publication of summons (Tr. page 60), and stated

therein that it appeared to the satisfaction of the judge from the affidavit of Fred S. Herrington (Tr. page 46) and from other evidence, that a subpoena *ad respondendum*, and also an alias subpoena *ad respondendum*, had been duly issued out of the Court and that diligent search had been made for Appellee in order to serve said subpoena and said alias subpoena upon her, and that Appellee could not, after due diligence, be found within the State of California or the jurisdiction of the Court and that Appellee had been and was concealing herself to avoid the service.

After said order for publication of summons, Appellants took all steps prescribed under the statutes of the State of California to serve Appellee by publication of summons, and upon due proof of all steps necessary default judgment against Appellee (Tr. page 67) was entered. In the recitals of the judgment it was said:

“The defendant, Grace Appleton McKey * * * having been duly and regularly served with summons and having failed to appear, plead or otherwise defend against the complaint of plaintiffs * * *”

More than three years after the entry of that judgment, Appellee submitted to the District Court a motion to dismiss the action and to quash the service of summons upon Appellee (Tr. page 69), upon the following grounds:

First: To dismiss the action on the ground that the action was in the wrong district because Appellee was

not and had not been an inhabitant of the Northern District of California;

Second: To quash the service

(a) Because the Court had no jurisdiction to order or approve service of summons outside its district; and

(b) Because the order of the Court directing publication did not comply with Section 412 of the Code of Civil Procedure of the State of California, in that the alleged facts in the affidavit for publication of summons of Fred S. Herrington, upon which the order was based, were predicated not upon the affiant's knowledge but upon hearsay; and

(c) Because the order of the Court directing publication of summons did not direct the depositing in the postoffice of a copy of the summons and complaint directed to Appellee at her place of residence.

Third: To dismiss the action on the ground

(a) That the action was barred by the Statute of Limitations;

(b) That the Court had no jurisdiction because the cause of action alleged in the complaint did not exceed the sum of \$3000.

Before the hearing of Appellee's motion the Appellants filed a motion with the District Court (Tr. page 78), in which they submitted affidavits of Leo K. Gold, the person especially appointed by the Dis-

trict Court to serve the alias subpoena, and James P. Lavelle, Deputy Marshal of the United States District Court for the Southern District of California, Central Division, requesting permission to file those affidavits as supplementary proof to show that all facts prerequisite for an order of publication of summons were present and complied with at the time when the order of publication of summons was made. (Tr. page 78.)

THE QUESTIONS INVOLVED.

(a) Can the District Court for the reasons upon which Appellee's motion is based vacate a judgment in absence of a motion to that effect?

(b) Is an attack on a default judgment made after the expiration of the six months' period prescribed in Rules 55(c) and 60 (b) of the Federal Rules of Civil Procedure a collateral attack and therefore subject to the limitations which are applicable to collateral attacks?

(c) Can the judgment be collaterally attacked upon the allegation that the affidavit for publication of summons contained defects concerning the mode of proof?

(d) Is it an abuse of the discretion of the District Court to deny the right to amend the proof of facts existing at the time the order of publication was made, if the amendment relates to the mode of proof as distinguished from the introduction of new material facts?

(e) In a collateral attack on a judgment, are the recitals in the judgment binding and conclusive as to the fact of service?

(f) Was the proof of the facts upon which publication of service was ordered sufficient under the California practice?

(g) Is a defendant who has concealed herself to avoid service estopped to allege defects of service by publication?

(h) Under California practice is an order for publication of service valid which does not direct service by mail, where the publication is ordered against a resident of the State upon the grounds that defendant cannot be found within the State and conceals herself to avoid service?

(i) Can absence of the jurisdictional amount render a federal judgment a nullity and make it subject to collateral attack?

(j) Does the representative suit of Appellants, creditors of an Illinois bank, brought against Appellee as one of several shareholders and defendants under the Illinois Banking Act, involve more than the jurisdictional amount of \$3000, although each individual appellant would receive less than \$3000, if the aggregate amount of the action is more than \$3000 and the individual liability of the defendant herself exceeds \$3000?

(k) Can a suit on shareholders' statutory liability be brought in the Northern District of California against a defendant shareholder who resides in the

Southern District of California, if co-defendants are residents of the Northern District?

(l) Did the District Court have jurisdiction to quash service of summons after the judgment had become final?

(m) Was the District Court's order erroneous, inconsistent and ambiguous because it ordered service of summons quashed and the judgment rendered upon such service vacated and simultaneously defendant was ordered to file her answer?

(n) Did Appellee submit herself to the jurisdiction of the District Court and waive the right to contend that improper service was made, when in her motion she pleaded matters concerning the merits of the case and the Court's jurisdiction of the subject matter as distinguished from jurisdiction of the person?

**SPECIFICATIONS OF ERRORS UPON WHICH
APPELLANTS RELY.**

The Appellants specify as errors (Tr. pages 98-99):

(a) that the order herein appealed from as to that portion thereof wherein and whereby the judgment entered against said Appellee Grace Appleton McKey, is vacated, was made in the absence of a motion of Appellee to vacate said judgment;

(b) That the District Court had and has no jurisdiction upon a motion to vacate a final judgment entered in a prior term of the Court if six

(6) months have expired after the entry of such judgment, as is more particularly described and defined in Rules 55(c) and 60(b) of the Federal Rules of Civil Procedure;

(c) That even assuming the existence of such jurisdiction in the Court, there were not sufficient factual or legal grounds warranting the Court's order vacating said judgment;

(d) That the District Court had no jurisdiction to quash service of summons after the judgment by default had become final, and that even if such jurisdiction did exist there were no factual or legal grounds warranting the Court's action quashing service of summons;

(e) That Appellants were entitled to file the supplementary affidavits of Leo K. Gold and James P. Lavelle in accordance with their motion, and that said affidavits eliminated all possible doubts as to the validity of the service of summons made upon the Appellee.

(f) That Appellee, by making her motion to dismiss the complaint herein and pleading matters concerning the merits of the case and the Court's jurisdiction of the subject matter of the complaint, and by participating in the hearing upon said motion, waived the right to have the service of summons quashed and thereby voluntarily submitted her person to the jurisdiction of the District Court.

ARGUMENT.**I.****THE DISTRICT COURT WAS IN ERROR IN VACATING THE JUDGMENT IN THE ABSENCE OF ANY MOTION TO THAT EFFECT.**

Appellee's motion upon which the District Court vacated the default judgment was to the effect that the action as to her should be dismissed for lack of jurisdiction of the person and of the subject matter and because the action was barred by the Statute of Limitations. (Tr. pages 69-71.) Appellee further moved to have service of summons quashed. (Tr. pages 69-71.)

Notwithstanding that no motion was made to vacate the judgment, the Court's order did vacate the judgment.

Rule 55(c) of the Rules of Civil Procedure provides that a default judgment can be set aside only for good cause shown and Rule 7 (b) prescribes that applications to the Court must be made by motion in writing unless made during a hearing or trial.

As the default judgment was vacated in the absence of any proper motion to vacate the judgment (assuming Appellee was entitled to make such motion), the order of the Court was in error because of the fact that the judgment was vacated in the absence of any motion to that effect, the Appellee apparently proceeding on the theory that the judgment was an absolute nullity and could be entirely ignored.

II.

EVEN IF A PROPER MOTION TO VACATE THE JUDGMENT HAD BEEN MADE, THE DISTRICT COURT HAD NO JURISDICTION TO VACATE THE JUDGMENT, SINCE MORE THAN SIX MONTHS HAD ELAPSED SINCE ITS ENTRY.

The default judgment was entered by the clerk of the District Court on April 18, 1939 (Tr. page 67), and Appellee's motion on which the judgment was vacated was filed more than three years thereafter on July 23, 1942. (Tr. page 77.)

The motion provided for in Rule 55(c) of the Rules of Civil Procedure to set aside a default judgment must be made within the period prescribed in Rule 60(b), that is, within six months after entry of judgment. The six months' period has taken the place of the former rule that to vacate a judgment the motion would have to be made within the same term of Court, so that after the expiration of the six months' period the Court loses its power to set aside its own judgment.

See

Reed v. South Atlantic Steamship Co. of Delaware, Dept. Just. Bull. No. 155 (1942).

As to the law prior to the Federal Rules of Civil Procedure, we refer to *Jackson v. Heiser*, *supra*; *Phillips v. Negley*, *supra*.

It is settled by the overwhelming weight of Federal authority that the so-called "Conformity Act" (28 U.S.C.A. Sec. 724) applies only to the mode of procedure up to final judgment and that the authority of the Federal Courts to thereafter set aside their

own judgments is to be decided only by Federal law and not by the law of the state in which the Federal Court sits. In support of this proposition we refer to the case of *Bronson v. Schulten*, 104 U. S. 410, 26 L. ed. 797, where the Court said:

“The question relates to the power of the courts and not to the mode of procedure. It is whether there exists in the court the authority to set aside, vacate and modify its final judgments after the term at which they were rendered, and this authority can neither be conferred upon nor withheld from the courts of the United States by the statutes of a state or the practice of its courts.”

This language from Mr. Justice Miller’s opinion in the *Bronson* case, *supra*, has become the settled rule of law. It is followed by the U. S. Supreme Court in *United States v. Mayer*, 235 U. S. 55 at page 69, 59 L. ed. 129 at page 136, where many other Federal authorities to the same effect are collected. We also refer to note 182 in 28 U.S.C.A., Sec. 724, wherein it is said:

“After the term has ended all final judgments and decrees of the court pass beyond its control unless steps be taken during that term by motion or otherwise to set aside, modify or correct them; and if errors exist they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which by law can review the decision. The question relates to the power of the courts and not to the mode of procedure, and state statutes and decisions on the point are not binding.”

Judgments of Federal Courts, even if jurisdiction was lacking, are reversible upon appeal or other proper proceedings, but they are not absolute nullities.

Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371, 378, 84 L. ed. 329, 334;

Stoll v. Gottlieb, 305 U. S. 165, 93 L. ed. 104, 111;

Noble v. Union River Logging Co., 147 U. S. 165, 37 L. ed. 123.

The principle that Federal judgments are not absolute nullities even if jurisdiction was lacking, and that they must be attacked by proper proceedings as prescribed by Federal law and precedent, does not necessarily lead to the conclusion that the expiration of the six months' period (as provided in Rules 55(c) and 60(b) of the Rules of Civil Procedure) leaves the party against whom the default judgment was entered without any relief. In proper cases such party may file an independent suit in equity to obtain relief from such a judgment. This remedy is expressly provided by Rule 60(b) of the Federal Rules of Civil Procedure. But we are not here concerned with the question whether the Appellee could have filed such independent suit in equity: Appellee cannot in the present proceeding be relieved from the judgment, for the reason that after the term of Court has expired (as formerly held), or after the expiration of the six months' period now prescribed by the Rules of Civil Procedure, there is no way to have a

Federal judgment vacated except by an independent action in equity.

In *Noble v. Union River Logging Co.*, supra, and *Stoll v. Gottlieb*, supra, the United States Supreme Court made an express distinction between strictly jurisdictional facts and quasi-jurisdictional facts, to the effect that as to the first type of facts a judgment may be collaterally attacked, and as to the second it may not. We need not discuss the question whether, after expiration of the six months' period under the Federal Rules of Civil Procedure, a motion would be sufficient where there is a lack of *strictly* jurisdictional facts, since the jurisdictional facts claimed by Appellee and urged upon the Court are merely *quasi-jurisdictional* as defined by the decisions of the United States Supreme Court just cited.

III.

EVEN ASSUMING THAT THE DISTRICT COURT HAD JURISDICTION TO VACATE ITS OWN JUDGMENT EITHER UPON MOTION OR IN ABSENCE OF ANY MOTION, THERE WAS AND IS NO SUFFICIENT BASIS EITHER IN FACT OR LAW WARRANTING THE COURT'S ACTION IN VACATING THE DEFAULT JUDGMENT.

- (1) AN ATTACK ON A DEFAULT JUDGMENT MADE AFTER THE EXPIRATION OF THE SIX MONTHS' PERIOD PRESCRIBED IN THE FEDERAL RULES OF CIVIL PROCEDURE IS A COLLATERAL ATTACK AND THEREFORE SUBJECT TO THE LIMITATIONS WHICH ARE APPLICABLE TO COLLATERAL ATTACKS.

Although Federal law and practice and not State law are determinative of the jurisdiction of the Fed-

eral Court to set aside its own judgment, the fact that Rule 60(b) of the Rules of Civil Procedure has been modeled upon Section 473 of the California Code of Civil Procedure gives special significance to the decisions of the California Courts in their interpretation of this section. Thus in the official annotations of Rule 60(b), the advisory committee states that this section is based upon Section 473 of the California Code of Civil Procedure. Having this in mind, we refer to the case of *People v. Norris*, 144 Cal. 422, in which case a judgment was entered against a defendant by default on May 26, 1896, and the motion to set this judgment aside was made several years thereafter on June 27, 1902. The principal ground for setting aside the judgment urged upon the Court was that the affidavit for order of publication of summons was defective in not showing due diligence on the part of plaintiff as to his inquiry of the whereabouts of the defendant and that the publication of the order for a period of only four weeks was insufficient and not in conformity with the statute.

In that case the Court pointed out that, notwithstanding certain defects in the affidavit, the default judgment was valid on its face, so that no evidence dehors the record was admissible to impeach it.

The Court based its ruling upon the different effect attributed to a collateral attack on the judgment as compared to direct attack. A motion made within the time limit prescribed by Section 473 of the California Code of Civil Procedure would have been a direct attack on the judgment not impeded or prevented by

a plea of the *res adjudicata* effect of the judgment, because it could not have been *res adjudicata* since the law specifically allows a period of time after entry of judgment to move to set it aside. However, a motion to set aside the judgment *after* the expiration of the statutory period of attack must be treated as a collateral attack. The Court says, at page 424, *supra*:

“The rule is different in cases of direct attack on a judgment by appeal or motion under Section 473 of the Code of Civil Procedure or otherwise in the line of proceedings in the case. But though an attack of the kind now before us may in one sense of the term be said to be direct, it is in the technical sense to be regarded as collateral—that is, a proceeding aside from or outside of the regular proceeding in the case. Or if we should prefer a different definition, then we must hold that the same rule applies to direct attacks of this kind as to collateral attacks.”

See also:

Irwin v. Scriber, 18 Cal. 499;

In re Griffith, 84 Cal. 107, 110;

Crouch v. H. L. Miller & Co., 169 Cal. 341;

Associated Oil Co. v. Mullin, 110 Cal. App. 385, 389.

We refer further to the recent case of *Washko v. Stewart* (1941), 44 Cal. App. (2d) 311 at 317:

“We have no hesitancy to say that because of the lapse of time between the entry of default judgment and the application by the defendant, Binkert, for relief therefrom, the court was with-

out jurisdiction to set aside such judgment of default * * * Undoubtedly if Binkert was not served with summons he was absolutely within his right in moving to have the judgment set aside, because he was thereby in violation of a fundamental principle, deprived of his property without due process of law and this right he possessed irrespective of Sections 473 and 473a of the Code of Civil Procedure. However, his right to invoke the aid of the court through a motion made in the action itself, is conditioned upon his making such motion within a reasonable time. By an unbroken line of judicial decisions it is established as the law of this State that a motion such as the one we are here concerned with may not be made beyond the time limit specified in Section 473a of the Code of Civil Procedure for making similar motions under that section (*Smith v. Jones*, 174 Cal. 513). Therefore, the motion, not having been made within one year after the rendition of the judgment, the court was without authority to grant the relief sought herein (citing cases). When the ordained period of time within which to make such a motion has expired, the aggrieved party has his remedy in a separate suit in equity.”

See also:

Smith v. Jones, 174 Cal. 513, 517;

Smith v. Bratman, 174 Cal. 518, 520.

In this connection we quote the following statement from 15 *Cal. Jur.* 47, Sec. 139:

“And a motion to set aside the judgment, not made within the period required by law, though in some of the early cases erroneously held and

treated as a direct attack, is aside from or outside the regular proceeding in the case and is a collateral attack, or at least governed by the rules applied to collateral attacks.”

(2) DEFECTS IN AN AFFIDAVIT FOR THE PUBLICATION OF SUMMONS WHICH CONCERN THE MODE OF PROOF DO NOT MAKE THE JUDGMENT SUBJECT TO COLLATERAL ATTACK.

The principal ground for vacating the judgment urged by Appellee is based on her contention that Herrington’s affidavit for the order of publication of summons (Tr. page 46) was largely hearsay. Without now discussing the contents of that affidavit, we submit that the question whether an affidavit is made on hearsay concerns the mode of proof and not the question whether the material facts are stated in the affidavit.

The United States Supreme Court has held in two decisions that defects of an affidavit for publication of summons, if such defects concern the mode of proof, do not render the judgment subject to collateral attack. In the case of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565, the United States Supreme Court passed on the question whether the defects in an affidavit made to obtain an Order of Publication, and in an affidavit by which the publication was proved, were sufficient to render the judgment a nullity and to permit of its collateral attack. The lower Court had so held and its reasoning was disapproved and reversed. The Supreme Court said at page 720 of the decision, page 568, 24 L. ed.:

“The court below did not consider that an attachment of the property was essential to its

jurisdiction or to the validity of the sale, but held that the judgment was invalid from defects in the affidavit upon which the Order of Publication was obtained, and in the affidavit by which the publication was proved. There is some difference of opinion among the members of this court as to the rulings upon these alleged defects. The majority are of the opinion that, inasmuch as the statute requires, for an order of publication, that certain facts shall appear by affidavit to the satisfaction of the court, or judge, defects in such affidavits can only be taken advantage of on appeal or by some other direct proceeding and cannot be urged to impeach the judgment collaterally * * *

If therefore we were confined to the ruling of the court below upon the defects in the affidavit mentioned, we should be unable to uphold its decision."

The opinion of the Supreme Court in *Pennoyer v. Neff*, supra, does not expressly indicate the character of the defects in the affidavit. We do not believe this to be material, since the Court's decision is clear to the effect that mere defects in the affidavit for publication of summons, irrespective of their character, do not make the judgment void on its face and subject to collateral attack. However, it is a fact that, in *Pennoyer v. Neff*, supra, the defect challenged was that the affidavit without giving any specific facts simply stated:

"The plaintiff being first duly sworn, says: that defendant, Marcus Neff, is a non-resident of this state, that he resides somewhere in California, at

what place affiant knows not and he cannot be found within this State.”

The foregoing facts appear in the Circuit Court's decision in *Pennoyer v. Neff*, supra, 17 Fed. Cas. 1273, and this decision was disapproved by the Supreme Court upon the ground above mentioned.

Since in *Pennoyer v. Neff* the lower Court had based its decision declaring the judgment void on the defects in the affidavit, the question whether the judgment was a nullity on account of those defects was squarely an issue in the case. The decision on that issue is therefore a binding precedent.

See

Florida C. R. Co. v. Schulte, 103 U. S. 118, 26 L. ed. 327.

Also,

Union P. R. Co. v. Mason City Ft. D. R. Co., 199 U. S. 160 at page 166, 50 L. ed. 134 at page 137.

We further refer to the case of *Thompson v. Thompson*, 226 U. S. 551 at page 565, 57 L. ed. 347, which is likewise directly in point. In that case the validity of a divorce decree of a Virginia Court was in issue. On appeal to the Supreme Court one of the reasons alleged for the invalidity of the decree was the fact that the affidavit on which the order granting publication of summons was based had been made upon information and belief. The Court first discussed whether under the Virginia law affidavits based upon information and belief could be used as a foun-

dation for an order for publication of summons and found the use of such an affidavit in conformity with the Virginia practice.

The Court then considered whether the judgment was void as *coram non judice* and subject to collateral attack even if under the State law an affidavit on information and belief was insufficient and defective proof of the facts required for an order granting publication of summons. The language of the Supreme Court on which we rely in the *Thompson v. Thompson* case, *supra*, is as follows:

“But, were it otherwise (meaning an assumption that under Virginia law an affidavit based upon information and belief for said purpose was defective), it seems well settled that where the affidavit used as a basis for an order of publication is defective, not in omitting to state the material fact, but in the mode of stating it, or in the degree of proof, the resulting judgment, even though erroneous, and therefore voidable, by direct attack, can not be said to be *coram non judice* and therefore void on its face.” (The statement in parentheses is ours.)

Following the foregoing citation from the case, the Court cites a line of authorities from many different jurisdictions but no authority from Virginia. The citation of authorities from other jurisdictions by the Supreme Court evidently is due to the fact that whether or not the judgment should be held void on its face for the foregoing reasons is a matter which the Court decided under general principles of law applicable to the writ of *coram non judice* and the

nullity of judgments, irrespective of the construction of the local state law.

The reasoning of the Court, although an alternative ground of the decision, is nevertheless a controlling authority, because where two reasons are given by the Court the Supreme Court of the United States has decided that both are controlling and neither can be considered as mere dictum.

See

United States v. Title Insurance & Trust Co.,
265 U. S. 472 at page 486, 68 L. ed. 1110 at
page 1114.

Therefore, relying on *Pennoyer v. Neff* and *Thompson v. Thompson*, supra, we contend the United States Supreme Court does not consider a judgment void on its face because of defects in the affidavit on which the order for publication of summons is based, if such defects do not consist of the omission of material facts to be shown for the obtaining of such order, but affect only the mode of proof.

The decisions of the United States Supreme Court in other cases as in *Bronson v. Schulten*, supra; *United States v. Mayer*, supra, and *Phillips v. Negley*, supra, have determined the conditions under which a Federal Court can disregard its own judgment within very narrow limits, and the case at bar does not fall within such limits.

We desire to emphasize the fact that in both cases cited, *Pennoyer v. Neff* and *Thompson v. Thompson*, the judgments were default judgments, so that the

decision of the Court as to the effect of such judgments refers to the Court's power to set aside default judgments or to grant relief therefrom.

(3) THE PLAINTIFFS HAVE THE RIGHT AT ANY TIME TO AMEND THE PROOF OF FACTS SUBMITTED FOR AN ORDER OF PUBLICATION.

Our previous discussion of the United States Supreme Court's decisions, holding that defects of an affidavit for a publication of summons do not make the judgment a nullity and subject to collateral attack, was based on the contention of Appellee that the affidavit of Herrington contained such defects, but we did not thereby admit that Herrington's affidavit was defective. Since Appellee by her motion called our attention to certain portions of that affidavit which she claimed were hearsay and which could be corrected by furnishing better proof, we moved the District Court for the privilege of implementing Herrington's affidavit by filing the affidavits of Leo K. Gold and James P. Lavelle. (Tr. page 78 et seq.)

It is well settled that amendments of an affidavit of the type in question, relating to the mode of proof as distinguished from the omission of the statement of material facts, can be filed at any time. Before going into the argument on this point we desire to refer again to the case of *Thompson v. Thompson*, supra, which lays down the distinction between the omission of a statement of material facts and the mode of stating such material facts or the degree of proof furnished for them. The Appellee could not and did not attack Herrington's affidavit for the

omission of material facts required in an affidavit for publication of summons on the ground of due diligence, nor upon the ground of concealment. Appellee's attack of Herrington's affidavit was based on the ground that he had stated too many facts therein on information and belief, so that the sufficiency of the mode of proof of the material facts was questioned by Appellee. In answer to Appellee's motion and before the hearing upon that motion, we moved the District Court for permission to file Leo K. Gold's affidavit and the affidavit of the Deputy United States Marshal, James P. Lavelle, to supplement and fill in further proof by direct testimony of those who participated in the acts concerning certain facts stated in Herrington's affidavit.

In our motion we cited certain decisions of the California Courts to the effect that such amended proof can be furnished at any time. We here refer to those decisions cited as authorities in connection with our motion (Tr. page 79):

City of Salinas v. Luke Kow Lee, 217 Cal. 252;

Bley v. Dessin, 31 Cal. App. (2d) 338;

Re Spiers, 32 Cal. App. (2d) 124;

Alpha Stores Ltd. v. You Bet Min. Co., 18 Cal.

App. (2d) 252;

Herman v. Santee, 103 Cal. 519.

In the *City of Salinas* case, *supra*, the service of summons was by publication and the point of attack was that the affidavit of publication, which constituted part of the judgment roll, indicated that the summons had been published for "one month" instead

of the statutory "two months". To overcome this pertinent deficiency the Court permitted the filing of an amended affidavit of publication, stating that the summons had in fact been published for the statutory period of two months.

The principle set forth in the *City of Salinas* case is identical with that urged in the present case, namely, that the proof required as to one step of the service, and which constituted part of the entire service of process, being challenged as insufficient, further proof was submitted to the Court as to the facts which were in existence at the time the Court made its order for publication of summons in the case at bar. In this case, as in the case just cited, it was intended to file the amended proof in order to "show the judgment entered was not without jurisdiction and never was void".

See .

City of Salinas v. Luke Kow Lee, supra, page 255,

citing

Herman v. Santee, supra.

In that same case, in discussing the problem, the Court at page 255 of the decision, cites from *Freeman on Judgments* at page 370, Section 193, the following:

"As a general rule, an officer who has made a return of process will be permitted to amend such return at any time. If the return upon the summons or other writ designed to give the court jurisdiction over the person of the defendant is

omitted or incorrectly made, but the facts really existed which were required to give the court jurisdiction, the weight of authority at the present time permits the officer to correct or supply his return until it states the truth, though by such correction a judgment apparently void is made valid. Though the proof of service of process does not consist of the return of an officer, the like rule prevails. *Thus, if a summons has been published in the manner required by law, but the proof of publication found in the files of the court is defective, the court may, on the fact of due publication being shown, permit an affidavit to be filed showing the facts, and when so filed it will support the judgment as if filed before its entry.*" (The italics are ours.)

The same passage from *Freeman on Judgments* is likewise cited with approval in *Herman v. Santee*, 103 Cal. 519 at page 523. See also *Allison v. Thomas*, 72 Cal. 562.

We refer also to *Freeman on Judgments*, 5th Ed., page 370, Section 193, from which the passage cited by the Court in the foregoing cases appears, and we cite from that author the following:

"A very important part of the judgment roll is that containing evidence of *service of process or the taking of such other steps as are necessary to give the court jurisdiction of the person of the defendant*; and it may happen that this part has been omitted from the roll, or has never been filed in court at all, or as filed and incorporated in the roll is defective, and not sufficient to sustain the jurisdiction of the court, when at-

tacked on appeal or by motion to set it aside, or even when assailed in a collateral action or proceeding. Then the question is whether the omission may be supplied, or the error corrected, and if so, by what means." (The italics are ours.)

The purpose of this citation from *Freeman*, supra, is to show that the California cases are not limited solely to the proof of service of process, but that amendments of proof are permitted as to all steps in connection with the service of process, which would include further proof of diligent search. The problem in our case is entirely identical as to all parts of the judgment roll "containing evidence of the service of process, or the taking of such other steps as are necessary to give the Court jurisdiction over the person of the defendant." One of those steps is the affidavit to be filed showing the inquiry which has to be diligently made as to the defendant's whereabouts. Freeman who was extensively quoted by the California Courts makes no distinction between evidence furnished as to that step and any other step connected with service of process, both actual and constructive.

We therefore submit that the above citations from California cases are conclusive on the point whether or not a judgment is void depends upon the existence of the facts giving the Court jurisdiction as of the time of the making of the order or judgment challenged. In the instant case the Court undoubtedly had jurisdiction if the facts stated in Herrington's affidavit are true and existed at the time the Court made its order for publication. Therefore, assuming

for the sake of this argument that certain of the facts were defectively stated as being hearsay in Herrington's affidavit, plaintiffs can now amend the proof of the existence of those facts by now filing the affidavits of Gold and the Deputy United States Marshal. A judgment can be void only for lack of jurisdiction, and if the Court in truth and in fact at the time of the rendering of its judgment had jurisdiction, the plaintiffs who had to show the jurisdictional facts should not be barred from amending their proof of these facts whether the former proof be defective or not.

In our motion for permission to file the supplementary affidavits above referred to, we relied on Rule 4(h) of the Rules of Civil Procedure, and in amplification of this reference we refer to 28 U. S. C. A., Sections 767 and 777.

The Federal Courts, in construing these sections, have interpreted them to be applicable to the amendment of affidavits filed in attachment and garnishment proceedings and affidavits in support of process. We refer to the cases of *Erstein v. Rothschild* (C. C. Mich. 1884), 22 Fed. 61, and *Booth v. Denike* (C. C. Tex. 1894), 65 Fed. 43.

We also direct the Court's attention to the case of *Mexican Cent. R. Co. v. Duthie*, 189 U. S. 76, 47 L. ed. 715, where after judgment an amendment of the pleadings to give the Court jurisdiction was permitted.

In the case of *Booth v. Denike*, supra, it might be noted that the laws of Texas did not allow an amendment of an affidavit of the type permitted to be

amended under Section 777 of the Judicial Code, but nevertheless the Court held that under the Federal statutes it would allow such an amendment and said, after the citation of Section 777:

“It seems clear that the last clause of Section 954, Revised Statutes (another citation of 28 U. S. C. A. 777), expressly confers upon the courts the power to permit parties to amend any defect *in the process or pleadings in furtherance of justice.*” (The parentheses and italics are ours.)

In *Dobie on Federal Procedure*, 1st Edition, that author at page 598, in discussing 28 U. S. C. A., Section 777, states:

“This statute accomplishing admirable procedural forms in the federal court is at the same time a statute of amendments, permitting a wide discretion as to the amendment of writs, processes and pleadings, and also a statute of jeofails, which prevents abatements, arrestings, quashings, or reversals for defects, of form as distinguished from real defects of substance. As a remedial statute it must be given a generous and liberal interpretation in accordance with its scope and spirit.”

(4) IN A COLLATERAL ATTACK, THE RECITALS IN THE JUDGMENT ARE BINDING AND CONCLUSIVE AS TO THE FACT OF SERVICE.

The judgment in this case reads in part as follows (Tr. page 67):

“The defendant, Grace Appleton McKey, sued herein upon her statutory liability as a stockholder in Woodlawn Trust & Savings Bank, an Illinois banking corporation, having been duly

and regularly served with summons and having failed to appear, plead or otherwise defend against the complaint of plaintiffs on file herein within the time allowed by law and the said summons, which time has not been enlarged; and the default of said defendant having been duly entered, upon application of plaintiffs to the clerk for judgment, and upon affidavit filed showing the amount due, etc.”

We refer to *Ballard v. Hunter*, 204 U. S. 241, 51 L. ed. 461, wherein it appears that a recital in a decree for the sale of lands for unpaid levee taxes that the non-resident defendants were “severally constructively summoned by publication * * * proof of which has been previously filed herein” is conclusive as against a collateral attack based on the objection that there was no sufficient proof of publication of the warning order or notice filed or produced in Court when the decree was made.

We further refer to the following California authorities to the same effect.

In the case of *Kaufman v. California Mining Syn., etc.*, 16 Cal. (2d) 90 (1940), a collateral attack was made on a judgment on the ground of certain alleged defects in the affidavits on file relating to the service of summons. Such service was effected by two methods: First, by service on the Secretary of State under Section 406a of the California Civil Code; and, second, by publication under Sections 412 and 413 of the Code of Civil Procedure. The Court upheld the judgment and relied on the recitals contained therein, saying, at page 93:

“In the present case it appears from the judgment in the other action that oral and documentary evidence was introduced and that the trial court there made its findings with respect to the validity of the service of process and the entry of the default. It does not affirmatively appear that these findings were based solely upon any particular document or documents relating to service of summons, and under these circumstances the presumptions in favor of the validity of the judgment make said findings conclusive upon collateral attack even though there may have been defects in some of the documents constituting part of the judgment roll and relating to the service of summons.

“In *Hahn v. Kelly*, supra, at page 431, it was said: ‘But if the judgment for proof of service refers generally to a paper or papers on file, or to a summons and sheriff’s return thereon without specifying any particular paper, summons or return, and if there be found on file papers showing a defective and void service, and nothing further appears, the law to support the judgment would presume that the court had other sufficient proof of service than that which remains on file; and it would not in that case appear affirmatively from the record that the recitals in the judgment were untrue. The recitals would therefore be conclusive proof of service, but if the judgment recites a due service of process without specifying how the service was made or referring to any paper as proof of it, the recital is *conclusive on the parties in a collateral proceeding*. * * *’

(The italics are ours.)

See also *Musser v. Fitting*, 26 Cal. App 746, at page 751, cited with approval in the *Kaufmann v. Cali-*

fornia Mining, etc. Syn. case, supra, and City of Salinas v. Lee, supra, where the Court said, at page 255:

“However, even in the absence of the amended affidavit showing proper service, we would be disinclined to agree with the appellant’s contention that the judgment is void on its face and therefore amenable to a motion to vacate made more than four years after its entry. Having been made long after the expiration of the period prescribed in Section 473 of the Code of Civil Procedure, such motion is governed by the rules applicable to collateral attack and must therefore be presented and determined upon the judgment roll alone. (Citing cases.) This being so, every presumption is in favor of the validity of the judgment, and any condition of facts consistent with its validity will be presumed to have existed rather than one which will defeat it. The judgment here assailed declares that ‘the default of the defendant has been duly and regularly entered in this cause in accordance with the law and the order of this court.’ This jurisdictional recital in the judgment constitutes a part of the judgment roll. It does not appear that said recital was at all based upon the original and deficient affidavit of publication. It may well be that prior to or at the same time of the entry of judgment it was made to appear to the trial court by other means that due publication of summons has been had. It will therefore be presumed in support of the judgment, and in conformity with the above cited cases, that proof other than the original affidavit was introduced satisfying the court below of the fact of due and proper service of the defendant and of the regularity of the default.”

(5) HERRINGTON'S AFFIDAVIT (Tr. page 46) WAS SUFFICIENT UNDER CALIFORNIA PRACTICE TO SUSTAIN THE ORDER FOR PUBLICATION OF SUMMONS.

The California Courts have distinguished between defects in affidavits which are fatal on direct attack and defects in affidavits which are fatal on collateral attack.

In this connection see *City of Salinas v. Lee*, supra, at page 256, and the citation from that decision set forth herein. The distinction was clearly described in the case of *Forbes v. Hyde*, 31 Cal. 342, where the Court said at page 348:

“There is a marked distinction between an affidavit which presents some evidence on a vital point, but clearly of a character too unsatisfactory to justify an order for publication of summons based upon it, and an affidavit which presents no evidence at all tending to prove the essential fact. In the former case the judge might be satisfied upon very slender and inconclusive testimony, but there being some appreciable evidence of a legal character which calls into action the judgment of the judge, he has jurisdiction to consider and pass upon it. He may be wholly and egregiously wrong in his conclusion upon the weight of the evidence, but he has jurisdiction to act upon it and his action is simply erroneous. His order would in such case be reversed on appeal. But, as there was jurisdiction to act until reversed, or attacked by some direct proceeding to annul it, the order and judgment based upon it would be valid. Such a judgment could not be collaterally attacked.”

The above passage was quoted with approval in *Ligare v. California S. R. R. Co.*, 76 Cal. 610. In that case the Court comments on the facts stated in the affidavit for publication of summons. We quote that part of the decision in full from page 612 in order to compare the facts set forth in the affidavit in that case with the facts set forth in Herrington's affidavit in this case.

At page 612 the Court says:

“The affidavit in question first states that certain defendants, among whom is plaintiff here, ‘have been sought for to obtain service of summons thereon, but after diligent search and inquiry cannot be found within the State.’ It then goes on to show what kind of search and inquiry have been made, viz., that the affiant ‘has made inquiry of all persons from whom he could expect to obtain information as to the residence of said defendants.’ It is not expressly stated what was the result of these inquiries. But the statement must be read in connection with what preceded it, viz., that after inquiry the said defendants ‘cannot be found within the state.’ And so reading it we think it is to be inferred that the inquiries were fruitless. The affidavit then goes on to state that ‘a summons and alias summonses’ had been placed in the hands of the sheriff of San Diego (which was where the property was situated) with instructions to serve it, and that he had made return that the defendants could not be found in his county, and that ‘alias summonses’ had been placed in the hands of the sheriffs of San Francisco, Los Angeles, Santa Clara, San Bernardino, Alameda, Humboldt, Yolo, Sacramento and others,’ with instructions to make

service, but that 'they have all returned said summonses with return either indorsed thereon or written responses that they have made diligent inquiry and search within their counties, and cannot find any of said defendants herein mentioned'."

The foregoing affidavit was held to be sufficient and not subject to collateral attack.

In *Rue v. Quinn* (137 Cal. 651) at page 656, the Court says:

"Whether upon a direct attack upon the judgment by an appeal therefrom within the time limited by statute, the order for such service could be reviewed upon the ground that the evidence was insufficient to justify the finding of due diligence, does not rise in the present case and need not be determined. In *Kahn v. Matthai*, 115 Cal. 689, service by publication was directed upon the ground that the defendant was seeking to conceal himself to avoid the service of the summons, and upon a direct appeal from the judgment it was held that the affidavit did not have any tendency to show that he was concealing himself. The present motion, however, was not made until after the time for an appeal from the judgment had expired."

It was there held that the affidavit containing hearsay was sufficient as against collateral attack and the Court at page 657 said:

"From the nature of the question to be determined the evidence thereon must to a very great extent be hearsay. * * *"

Omitting everything in Herrington's affidavit referring to his correspondence with the process server Gold, there still remains an affidavit which is very similar (although in much greater detail) to the affidavit in the *Ligare* case. In his affidavit he states in detail that he placed the summons in the hands of the United States Marshal in Los Angeles, setting forth the instructions given to the United States Marshal, and that all search made by the Marshal was futile, and after numerous attempts to serve process the Marshal returned the summons. Then the affidavit states (Tr. p. 57), as a fact and not on information and belief, "that affiant and said attorneys have made a diligent search for said defendant and have made inquiries of each and every person whom they could expect or had any reason to believe they would receive information as to the whereabouts of said defendant, that affiant and said attorneys do not know the present whereabouts of said defendant and cannot learn her present whereabouts * * *." These statements alone are entirely sufficient to uphold the affidavit under the rule laid down in the *Ligare* case.

- (6) APPELLEE HAS MADE NO PROOF THAT WITH DUE DILIGENCE SHE COULD HAVE BEEN FOUND IN THE STATE OF CALIFORNIA OR THAT SHE DID NOT CONCEAL HERSELF TO AVOID THE SERVICE OF PROCESS.

The affidavit which Appellee executed in support of her motion (Tr. page 76) states only generalities which do not specifically claim that any of the facts stated in Herrington's affidavit and in the certificates of the Deputy United States Marshal are incorrect or untrue. These statements in her affidavits are so broad

that they do not lead anywhere to nullify the proof furnished by Appellants for both facts, namely, that Appellee after due diligence could not be found within the state and that she concealed herself in order to avoid service.

(7) A DEFENDANT WHO CONCEALED HERSELF TO AVOID SERVICE IS ESTOPPED FROM CLAIMING DEFECTS IN THE SERVICE BY PUBLICATION.

The District Court, in its order for publication of summons (Tr. page 60), stated as one of the grounds for publication of summons "that said defendant has been and now is concealing herself to avoid the service of said process."

That defendant conceals herself to avoid service implies knowledge of the pendency of the action. In fact, Appellee's relative, defendant Kathryn Riddell (Tr. page 49), had been served with subpoena in the same action on December 11, 1936 (Tr. pages 40-41) and final decree *pro confesso* had been entered against her on March 30, 1937. (Tr. page 67.)

Actual knowledge of the pendency of an action in which service by publication was made precludes the defendant from obtaining relief from a default judgment rendered on such service even if motion is made within the statutory period.

Boland v. All Persons, 160 Cal. 486:

Hiltbrand v. Hiltbrand, 218 Cal. 321.

These California cases demonstrate that a defendant who had concealed herself to avoid service would even within the statutory period be estopped from moving to set aside a default judgment.

We submit that a defendant who has concealed herself to avoid service is estopped from seeking any relief based upon improper service by publication.

See:

Collins v. Streitz (1936), 47 Ariz. 146, 54 P. (2d) 264 (appeal dismissed 298 U. S. 640, 80 L. ed. 1373).

- (8) THE OTHER POINTS URGED BY APPELLEE IN HER MOTION DID NOT WARRANT THE COURT'S ACTION VACATING THE DEFAULT JUDGMENT.
- (a) The order of publication is valid without directing service by mail where the defendant is a resident of the state who after due diligence cannot be found within the state and likewise where such defendant conceals himself to avoid service of summons.

The mailing of summons is prescribed in Section 413 of the California Code of Civil Procedure where the order for publication of summons is made against a defendant who is a non-resident or is absent from the state. (See *Rickeston v. Richardson*, 26 Cal. 149.)

In the present case, however, Appellee admits that she was a resident of the state and the order of publication was applied for because after due diligence she could not be found within the state, being a resident of the state, and because she concealed herself to avoid service of summons.

In cases of this type the order for publication of summons is valid without directing the mailing of summons in addition to publication. The Court in the case of *Ligare v. California S. R. R. Co.*, supra, says at page 614:

“It is only in the first two mentioned cases (where the defendant resides out of the state or where he has departed from the state) that Section 413 requires the order to direct the depositing in the post office, and consequently it is only in such cases that the affidavit is required to state whether the defendant’s residence is known to affiant * * * The cases in which the deposit is to be made are distinctly specified and the court ought not to extend the requirements to other cases.” (The statement in parentheses is ours.)

(b) **The District Court had jurisdiction because the amount involved was in excess of the jurisdictional amount.**

Whether the jurisdictional amount was present or not is a factor which cannot make the judgment a nullity because the presence of the jurisdictional amount is a quasi-jurisdictional fact only.

See:

Noble v. Union River Logging Co., supra, and
Stoll v. Gottlieb, supra.

At the time of her motion it was therefore too late for Appellee to urge this point. However, we maintain that the District Court had jurisdiction, as the jurisdictional amount involved was in excess of \$3000.

This is a representative suit brought by plaintiffs, creditors of the Woodlawn Trust and Savings Bank in their representative capacity for the benefit of all creditors of said bank against several defendant stockholders. The Appellants’ claims in the aggregate exceed \$3000. The sum sought to be recovered from the

Appellee, McKey, alone was found by the judgment of this Court, to far exceed the minimum jurisdictional amount.

The only jurisdictional question, therefore, involved is whether the claims of the plaintiffs and all creditors represented in the suit can be totaled to make up the required jurisdictional amount.

In the case of *Handley v. Stutz*, 137 U. S. 366, 34 L. ed. 706, a representative suit in the nature of a creditor's bill was brought on behalf of all of the creditors of a corporation against the corporation and its stockholders. The bill was not founded upon a direct liability, but upon the theory that the sums due to the corporation from the stockholders on their unpaid subscription to stock ought to be paid by them to the corporation as a trust fund to be distributed among the plaintiffs and the other creditors of the corporation.

The claims of the individual plaintiffs, each taken individually, were less than the jurisdictional amount, and less than the amount necessary to support the jurisdiction of the Supreme Court on appeal. The Court allowed the claims of the plaintiffs to be totaled, and on page 708 said:

“The sums alleged to be due from the corporation to the original plaintiffs amounting to more than \$2,000.00, the Circuit Court had jurisdiction of the case and authority to administer and distribute the amount due from the individual defendants to the corporation for unpaid subscriptions to stock, as a trust fund for the benefit of all the creditors of the corporation. * * *

“The trust fund so administered and ordered to be distributed by the Circuit Court amounting to much more than \$5,000.00, the appellate jurisdiction of this court is not affected by the fact that the amounts decreed to some of the creditors are less than that sum. It is immaterial to the Appellants how the amounts should be distributed, and (which is more decisive) such a bill as this would not have been filed by one creditor in his own behalf only, and the case does not fall under that class in which creditors who might have sued severally join in one bill for convenience and to save expense. This court, therefore, has jurisdiction of the whole appeal according to the rule affirmed in *Gibson v. Shufeld*, 122 U. S. 27, and the cases there collected.”

See, also,

Shields v. Thomas, 17 How. 3, 15 L. ed. 93.

The Supreme Court, in thus arriving at the result that the claims can be aggregated, stresses three factors:

1. That it was immaterial to the defendants how the sums decreed to be paid by them should be distributed.
2. That such a bill could not have been filed by one creditor in his own behalf only.
3. That the case does not come under the class in which creditors who might have sued severally join in one bill for convenience and to save expense.

It has been definitely decided under the Illinois law that a suit of the type here brought is a representative suit brought by one of a class against one or more defendants for the benefit of the plaintiff class, and to collect a common fund for the plaintiff creditors.

The Illinois statute set out in paragraph VIII of the complaint (Tr. page 18), chapter 16a, Section 11, of the Illinois State Bar Statutes, provides:

“When any banking association, organized under this act shall have gone into liquidation under the provisions of this section of the Act, the individual liability of the shareholders provided for by section six (6) of this act may be enforced by any creditor of such association, by bill in equity, in the nature of a creditor’s bill, brought by such creditor on behalf of himself and all other creditors of the association against the shareholders thereof, in any court having jurisdiction in equity for the county in which such bank or banking association may have been located or established.”

It will be noted from the foregoing that the statute itself specifies that the suit is a representative suit.

We refer to the recent case of *Heime v. Degen* (1936), 362 Ill. 357, wherein the Supreme Court of Illinois held that a suit brought by certain creditors of an insolvent bank against the stockholders was a class suit on behalf of the collective body of all the creditors of the bank, and that the names of the creditors who were not plaintiffs had not to appear on the complaint, because they were considered to be represented by the

plaintiffs and to be bound by the decision of the Court, without their names appearing on the complaint.

In *Babka Plastering Co. v. City State Bank of Chicago* (1931), 264 Ill. App. 142, the Court said at page 151:

“It is true these courts (meaning the courts of last resort in different jurisdictions) have not been of the same opinion. However, the generally accepted rules are that the fund created by the statute is in the nature of a security for the common benefit of the creditors.” (The statement in parentheses is ours.)

In the *Babka* case the Court ruled that the creditor of the bank who brings suit acts in a representative capacity for the benefit of all creditors, and that all creditors are bound by said proceedings.

It therefore appears that all of the factors mentioned in *Handley v. Stutz*, supra, a United States Supreme Court case, are present in the instant case, because the Illinois law sanctions a suit by a creditor or group of creditors in a representative capacity for the benefit of all creditors against stockholders or a group of stockholders for the recovery of a fund to be collected and prorated among all creditors of an insolvent bank, the mode of distribution being immaterial to the defendants.

There is a very recent federal authority which is directly in point and entitled to special consideration, in view of the fact that the Federal Court of the Northern District of Illinois there passed on the pertinent statutory and case law of Illinois. We re-

fer to the case of *Reconstruction Finance Co. v. Central Republic Trust Co.* (1935), 11 Fed. Supp. 976, affirmed in 102 Fed. (2d) 304. In that case the Court points out that if the creditors were remitted to their remedy at law the creditor who first sued would be entitled to priority over a creditor suing subsequently but who obtained judgment first, and that each creditor would have a distinct group of stockholders answerable to him. In view of the interweaving claims and liabilities the Court draws the conclusion that each creditor is entitled to have the creditors' claims apportioned in such a way that the equitable rule that the claim of each creditor shall be allocated so as to impinge the least upon the claims of other creditors will be observed. Therefore the Court concluded that equity requires that the amounts for which the stockholders are separately liable should be brought together in one fund in order that the rights of the creditors therein may be equitably adjusted. Basing its conclusion on the foregoing, the Court says at page 985:

“If the foregoing ruling as to the grounds for equity jurisdiction is well founded, the jurisdictional objection of those stockholders whose stock is of par value of \$3,000 or less must fail. The amount in controversy is not measured by the claim against each particular stockholder. It is the amount to be collected and apportioned among the stockholders (citing cases). The plaintiff under both the general equity practice and Equity Rule 38 (28 U. S. C. A. following Section 723) is entitled to maintain this suit on its own behalf and on behalf of all other creditors of the bank.”

See, also,

Brusselback v. Cago Corporation, 85 Fed. (2d)
20 at 23.

(c) Suit against appellee could be brought in the northern district where other defendants resided, although appellee resided in the southern district of the state.

The action was properly brought in the United States District Court for the Northern District of California. It will be noted from the Marshal's returns on the subpoena (Tr. pages 34, 38 et seq.) that all the defendants were either residents of the Northern or of the Southern Districts of California. The instant case was brought within the purview of *Judicial Code*, Section 52, amended 28 *U. S. C. A.* 113, which provides as follows:

“When a state contains more than one district, every suit not of a local nature in the district court thereof, against a single defendant, must be brought in the district where he resides, but if there are two or more defendants residing in different districts of the state, it may be brought in either district, and a duplicate writ may be issued against the defendants directed to the Marshal of any other district in which any other defendant resides.”

The United States Supreme Court has passed upon this provision in *Petri v. Creelman Lumber Company*, 199 U. S. 487, 50 L. ed. 281, where prior acts of Congress, particularly the Special Act of March 2, 1887, relating to the division of the State of Illinois into judicial districts, are discussed. Referring to the language of that special act, which was substantially the

same as the language of the present act, the Court says, at page 495:

“The text making this provision is free from ambiguity and, if its plain import be followed, is decisive.”

Nowhere in its discussion of this provision does the Court indicate that a distinction should be drawn between cases in which the suit is brought against defendants with joint liability and actions against defendants who are severally liable.

We desire however to comment on the difference in wording in the text with the provisions of the Judicial Code, Section 51(b) amended (28 U. S. C. A. 112), and Section 52 of the Judicial Code, *supra*.

In Section 51, subsection (b), the United States are granted the privilege to bring suit “where there be more than one defendant in any district whereof any one of the defendants, being a necessary party, or being jointly, or jointly and severally liable, is an inhabitant”. If Section 52 had been intended to cover only the cases where the defendants are jointly liable, undoubtedly the same language would have been used as in Section 51(b). The comparison of both sections makes it obvious that if several defendants, residing in different districts of the same state may be joined as defendants, a suit so joining them can be brought in either district.

As discussed above, the instant suit is a representative suit brought by the plaintiffs for a trust fund for the benefit of all creditors, whether joined or not

joined in the action, and against all defendants as stockholders of the bank. In this connection we again refer to the case of *Reconstruction Finance Co. v. Central Republic Trust Co.*, supra. There the Court has even, for purposes of determining the jurisdictional amount, allowed the aggregation of the sums owed by various defendant stockholders of an Illinois bank. The Court held that the stockholders' liability under the Illinois law was of such nature that the various defendants could be joined together not merely for reasons of practical expediency and to save expense, but because their liabilities were interwoven with each other to such a degree that the amounts owed by them should be aggregated to make up the jurisdictional amount.

The purpose of the present Section 52 of the Judicial Code (28 U. S. C. A. 113) has been discussed in the recent case of *Melvin Lloyd Co. v. Stonite Products Co.*, 119 Fed. (2d) 883, and has been determined to the effect that the sole purpose of this section was to preserve to the plaintiff, after division of a state into judicial districts, the same right to bring one suit against any number of residents of that state even though they might happen to live in different districts. In other words, for all purposes of venue, the division of the state into different districts shall be disregarded if plaintiff desires to bring the suit against defendants, some of whom reside in one district and the others in another district of the same state.

We agree with Appellee that the mere adding of a defendant cannot create jurisdiction in any case.

However, the Courts, in construing Section 52 of the Judicial Code, *supra*, have set up a different test than Appellee's test of joint liability of defendants. The test which the Courts have applied is whether the party residing in the district of the Court is merely a nominal and unnecessary party as distinguished from a real party in interest.

Baltimore and Ohio R. Co. v. Board of Public Works, 17 Fed. Supp. 170;

Nakken Patents Corp. v. Westinghouse Electric and Mfg. Co., 21 Fed. Supp. 336.

In our case the defendants in Northern California were just as liable as stockholders as Appellee residing in Los Angeles, so that all of them were real parties in interest.

We refer to the case of *Skagit County v. Northern Pacific Railway Co.*, 61 Fed. (2d) 638, 642, where the Court took jurisdiction when there was no joint liability of the various defendants, but where the issues were identical in all cases and as to all defendants.

See, also,

Smith v. Merrill, 81 Fed. (2d) 609.

IV.

THE DISTRICT COURT HAD NO JURISDICTION TO QUASH SERVICE OF SUMMONS AND ITS ORDER TO THAT EFFECT WAS IN ERROR.

When the judgment became final, the District Court lost jurisdiction of the case and therefore the Court could not quash service of summons.

Bronson v. Schulten, supra;

United States v. Mayer, supra.

Moreover, the order of the Court is erroneous, inconsistent and ambiguous, in that the Court at the same time quashed service of summons and yet ordered Appellee to file an answer. By ordering her to file an answer the Court expressed its opinion that the Appellee was properly before the Court. If the Appellee was properly before the Court, the quashing of former service of summons was an idle act, because plaintiff was not obliged to serve summons again, and the necessity of again serving summons is the only effect incident upon an order quashing service.

V.

APPELLEE BY MAKING HER MOTION TO DISMISS THE COMPLAINT HEREIN, BY PLEADING MATTERS CONCERNING THE MERITS OF THE CASE AND THE COURT'S JURISDICTION OF THE SUBJECT MATTER, VOLUNTARILY SUBMITTED HER PERSON TO THE JURISDICTION OF THE DISTRICT COURT AND WAIVED THE RIGHT TO RELY ON THE DEFENSE OF IMPROPER SERVICE.

Appellee did not move to vacate the judgment. She moved to have the service of summons quashed and

plaintiff's action dismissed. She based her motion on various grounds, among them the following (Tr. page 70):

“To dismiss the action as to this moving defendant on the grounds:

(a) That the action is barred as to her by the statute of limitations applicable, to-wit: Section 337 or Section 338 of the Code of Civil Procedure of the State of California, in that it appears from the complaint that more than four (4) years elapsed between the accrual of the alleged liability and the filing of this action.

(b) That this court has no jurisdiction over the cause or causes set out in the bill of complaint, in that as alleged the matter in controversy does not in any cause of action alleged herein exceed the sum of \$3,000.00.”

In alleging that the action was barred as to her by the statute of limitations, Appellee made a plea on the merits of the case, and by alleging that the Court had no jurisdiction for lack of the jurisdictional amount, Appellee pleaded lack of jurisdiction of the subject matter. Both pleas are fatal to her plea of lack of jurisdiction over her person. In setting up both grounds above referred to, Appellee made a general appearance and was thereafter in no position to question the service of process or to urge the vacating of the judgment on the ground that she had not been properly served with summons and that the Court had not obtained jurisdiction of her person.

In the recent case of *Raps v. Raps*, 20 Cal. (2d) 382, it was said that an appearance in Court of an attorney for the executor of a deceased party for the

purpose of challenging the jurisdiction of the Court to entertain a motion to vacate a judgment on the ground of want of jurisdiction over the subject matter constituted a general appearance by the personal representative, even though objection to the jurisdiction over the person was simultaneously interposed. The Court (at page 385) cited from the case of *Olcese v. Justice's Court*, 156 Cal. 82, the following:

“* * * Here is one reason for the well settled rule that if a defendant wishes to insist upon the objection that he is not in court for want of jurisdiction over his person, he must specially appear for that purpose only and must keep out for all purposes, except to make that objection. Another reason equally valid is that if such defendant shall ask for any relief other than that addressed to his plea, he is seeking to gain an unconscionable advantage over his adversary whereby, if the determination of the court be in his favor, he may avail himself of it, while if it be against him he may fall back upon his plea of lack of jurisdiction of the person. So it is well settled that if a defendant under such circumstances raises any other question, or asks for any relief which can only be granted upon the hypothesis that the court has jurisdiction of his person, his appearance is general, though termed special, and he thereby submits to the jurisdiction of the court as completely as if he had been regularly served with summons.”

We likewise cite the case of *Security Loan & Trust Co. v. Boston & South Riverside Fruit Co.*, 126 Cal. 418, where it has been held that a motion to set aside a default judgment on the grounds of no valid service of process, and that the complaint did not state a cause

of action, submitted the defendant to the jurisdiction of the Court over his person.

CONCLUSION.

Appellee has failed to move within the period prescribed by Rules 55 (c) and 60 (b) of the Federal Rules of Civil Procedure. She attacks the judgment collaterally. In such an attack Appellee cannot be heard on any of the grounds to which she points for the invalidity of the judgment, because none of them would make the judgment a nullity. Moreover all jurisdictional facts which are required were actually present and complied with at the time when the judgment was entered.

Appellants' motion to file supplementary affidavits in order to amend the mode of proof as to the facts prerequisite for the publication of service could not be denied by the District Court without abuse of discretion.

The District Court lacked jurisdiction to quash service upon collateral attack after the judgment had become final, and its order quashing service and directing Appellee to file an answer are inconsistent and ambiguous.

Appellee by basing her motion on a plea to the merits on the defense of the statute of limitations and lack of jurisdiction of the Court on the subject matter entered a general appearance and waived the right to challenge the Court's jurisdiction of her person and therefore her motion to quash service of

summons, and if it can be considered as having been made, her motion to vacate the judgment, were improperly granted by the District Court.

We therefore submit that for the reasons set forth in this brief the District Court was in error in vacating the judgment, granting Appellee's motion to quash service, and denying Appellants' motion to permit the filing of the affidavit of Leo K. Gold and James P. Lavelle; and we respectfully request that this Court reverse those portions of the order of the District Court.

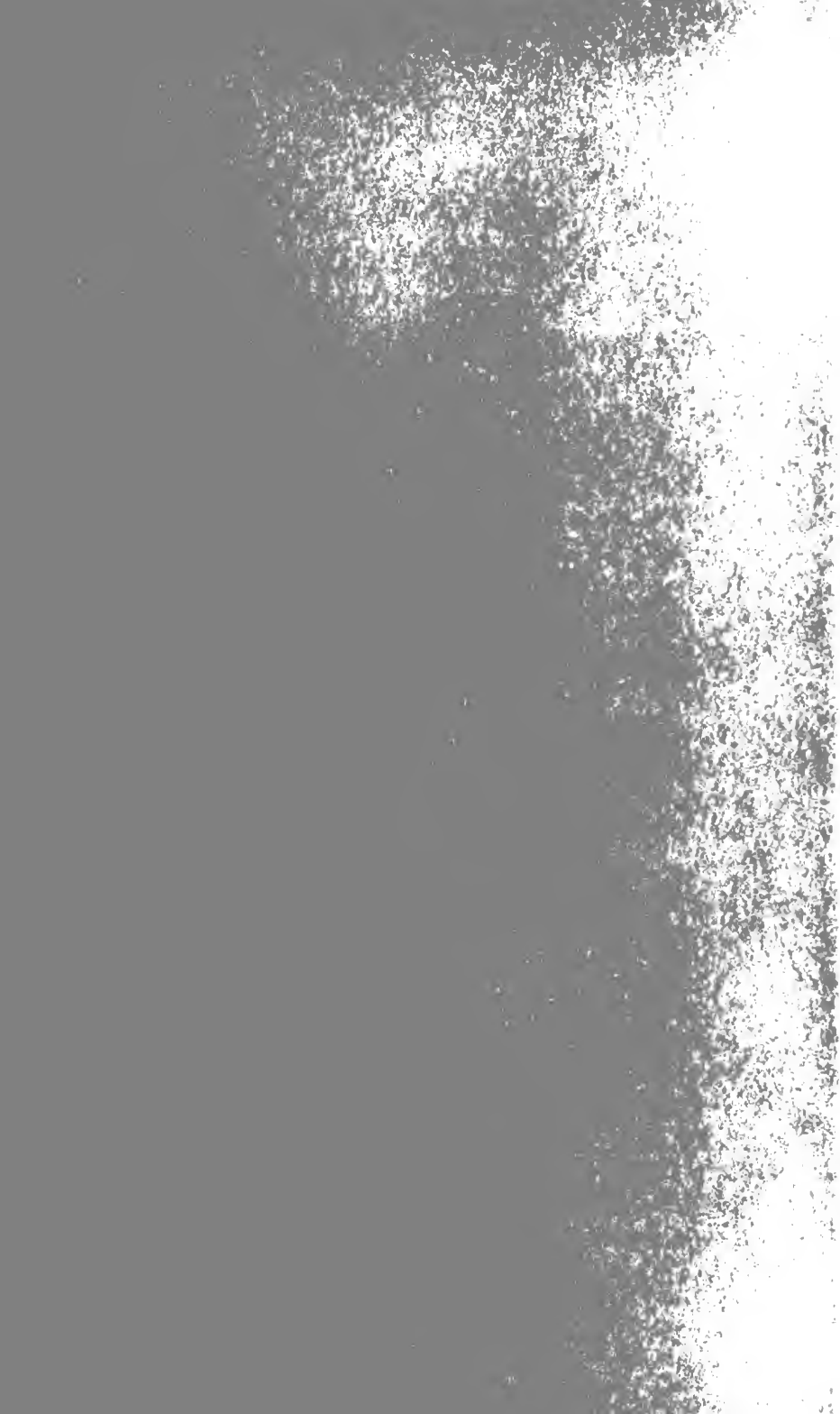
Dated, San Francisco,
May 3, 1943.

Respectfully submitted,
DINKELSPIEL & DINKELSPIEL,
Attorneys for Appellants.

(Appendix Follows.)



Appendix.



Appendix

STATUTES INVOLVED.

Rules of Civil Procedure for the District Courts of the United States:

Rule 4(h): *Amendment.* At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

Rule 7(b): *Motions and Other Papers.*

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

Rule 55(c): *Setting Aside Default.* For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

Rule 60(b): *Mistake; Inadvertence; Surprise; Excusable Neglect.* On motion the court, upon such

terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U.S.C., Title 28, §118, a judgment obtained against a defendant not actually personally notified.

28 U. S. C. A. 767:

Amendment of Process. Any district court may at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of any process returnable to or before it, where the defect has not prejudiced, and the amendment will not injure the party against whom such process issues. (R. S. §948.)

28 U. S. C. A. 777:

Defects of form; Amendments. No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring

specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe. (R. S. §954.)

California Code of Civil Procedure:

§412: *Service by Publication: Grounds.* Where the person on whom service is to be made resides out of the State; or has departed from the State; or cannot, after due diligence, be found within the State; or conceals himself to avoid the service of summons; or is a corporation having no officer or other person upon whom summons may be served, who, after due diligence, can be found within the State, and the fact appears by affidavit to the satisfaction of the court, or a judge or justice thereof; and it also appears by such affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action; or when it appears by such affidavit, or by the complaint on file, that it is an action which relates to or the subject of which is real or personal property in this State, in which such person defendant or corporation defendant has or claims a lien or interest, actual or contingent, therein, or in which the relief demanded consists wholly or in part in excluding such person or corporation from any interest therein, such court, judge, or justice, may make an order that the service be made by the publication of the summons * * *

§413: *Order for Publication: Personal service equivalent to publication or deposit in post office: Service complete, when.* The order must direct the publication to be made in a newspaper, to be named and designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once each calendar week; but publication against a defendant residing out of the State, or absent therefrom, must not be less than two months, except in proceedings instituted pursuant to the provisions of Chapter IV, Title III, Part III, of this code. In case of publication, where the residence of a nonresident or absent defendant is known, the court, judge, or justice, must direct a copy of the summons and complaint to be forthwith deposited in the post office, directed to the person to be served at his place of residence * * *

§473: *Pleadings may be amended.* The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code.

Continuance. When it appears to the satisfaction of the court that such amendment renders it necessary, the court may postpone the trial, and

may, when such postponement will by the amendment be rendered necessary, require, as a condition to the amendment, the payment to the adverse party of such costs as may be just.

Relief from judgment taken by mistake, etc. The court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken.

Correction of clerical mistakes in judgments or orders. Setting aside void judgment or order. The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order.



No. 10,381

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

JAMES W. BUTLER, et al.,

Appellants,

VS.

GRACE APPLETON McKEY,

Appellee.

BRIEF FOR APPELLEE.

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No. 10,381

IN THE

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For the Ninth Circuit

JAMES W. BUTLER, et al.,

Appellants,

VS.

GRACE APPLETON McKEY,

Appellee.

BRIEF FOR APPELLEE.

INTRODUCTION.

In April, 1939 appellants' San Francisco counsel, for the purpose of procuring an order for publication of summons against appellee, a resident of the Los Angeles district submitted to the judge of the trial Court the affidavit of one of the counsel residing in San Francisco, which recited the purported unsuccessful efforts of a specially hired process-server in Los Angeles, and to a slight degree the efforts of a deputy marshal, to locate and serve appellee defendant. Since neither the process-server nor the deputy marshal supplied any affidavit, the showing was entirely hearsay, with the result that if any part of the

affidavit is false no perjury has been committed. If the process-server, to make his fee look more reasonable, has exaggerated his activity in making the search and endeavoring to serve, it was only poetical license and not perjury. Of course, the affiant, to be entirely honest, had only to paraphrase or quote from letters he received from his two informants.

Appellee charges that the service is void, because the affidavit base for the order for publication was mere hearsay and not legal evidence. In June 1942 appellee for the first time learned that a judgment had been taken against her, and moved to set aside the service, presenting to the trial Court pertinent decisions of California Courts holding that such orders, predicated upon mere hearsay affidavits, and the resultant default judgments are absolutely void for all purposes.

The trial Court supported by the said precedents declared the service and the judgment void and this is plaintiffs' appeal from the order vacating the same.

We shall cover each point raised in appellants' opening brief and in the order therein set out.

I.

ANSWER TO APPELLANTS' ARGUMENT THAT: "THE DISTRICT COURT WAS IN ERROR IN VACATING THE JUDGMENT IN THE ABSENCE OF ANY MOTION TO THAT EFFECT."

(Appellants' Brief, p. 12.)

We can hardly believe that appellants are serious in presenting this point. Are they claiming that because appellee asked more than she received in her motion, that she is entitled to recover nothing on her motion?

Certainly appellants could not have been in doubt, at the hearing, as to the fact that appellee was attacking the judgment as a void judgment, when the motion to dismiss was directed to the Court's lack of jurisdiction and when there was specifically included in the "Notice of Motion" a motion to quash the service of summons on the ground that the affidavit, upon which the order of publication was predicated, was hearsay and therefore not an adequate base for the order for publications of summons.

An adequate answer to appellants' argument is that the judgment being a void one, the Court had the power to set it aside on its own motion, without any intervention by appellee. (See pages 22 to 24 of this brief.)

II.

ANSWER TO APPELLANTS' POINT THAT: "THE DISTRICT COURT HAD NO JURISDICTION TO VACATE THE JUDGMENT, SINCE MORE THAN SIX MONTHS HAD ELAPSED SINCE ITS ENTRY."

(Appellants' Opening Brief, p. 13.)

As appellants state, appellee's motion was made over three years after the default judgment was entered. However, it was filed less than two months after appellee first learned that judgment had been taken against her. (R. 67, 76.)

From the above fact appellants argue that the motion came too late because not brought within the time limit fixed by Rules of Civil Procedure, 55 (c) and 66 (b).

Rule 55 deals with judgments by default—judgments rendered by the failure of a defendant to plead after a legal service of process upon him. A "default judgment" rendered against a defendant who has not been served is not a judgment—or at the best as we shall later demonstrate, it is a *void* judgment—a nullity.

Rule 55 declares "that if a judgment by default has been entered" it for good cause shown may be set aside *in accordance* with Rule 60 (b). Rule 55 does not say, as appellants suggest, that the default and judgment may be set aside "within the period prescribed in Rule 60 (b)."

Rule 60 (b) does more than prescribe a time limit of 6 months after judgment for moving to set aside a

judgment; it gives the grounds as “mistake, inadvertence, surprise or excusable neglect” of the defendant.

The default judgment in the case at bar was absolutely void, because the affidavit upon which the order for publication was based was mere hearsay and did not contain any legal evidence justifying the order. On pages 36-37 we analyze the affidavit and on pages 35-36 we cite the authorities which declare such an order void for all purposes.

It is perfectly obvious that the above referred to rules are not concerned with *void* judgments or judgments upon which the *default* is fictitious, but relate to defaults following a legal service, made under the rules.

Appellants cite no cases interpreting the rules relied upon by them, but—prefacing their citations with the statement that the “six months’ period has taken the place of the former rule that to vacate a judgment the motion would have to be made within the same term of Court, so that after the expiration of the six months’ period the Court loses its power to set aside its own judgment” (Apps. Br. p. 13)—they cite cases referring to the Court’s power or lack of it, after expiration of the term in which judgment was rendered.

We shall briefly discuss appellants’ citations for the purpose of showing that in none of them was a “void judgment” involved. Later and on pages 20 to

25 herein we shall call attention to several of an almost endless list of decisions of the U. S. Supreme Court holding that void judgments are nullities and not to be given effect as judgments at any time.

Appellants' citations.

Appellants' first citation is *Reed v. So. Atlantic Steamship Co.*, "Dept. Just. Bull. No. 155 (142)." We were unable to secure a copy of the referred to bulletin, but we did find the case reported in 2 Fed. Rules Decs. 475. It is a decision of a Delaware District Court and involved the power of the Court, "after term", to make an order dismissing an action for failure to prosecute, after the clerk had given the attorneys for the appearing litigants thirty days to bring the case to trial, under threat of dismissal. No question of lack of notice or of validity of the original order was involved. The motion was for relief from the order on the ground it was taken against him through inadvertence, which, under Rule 60(b), must be made within six months of the date of the order.

In *Phillips v. Negley*, 117 U. S. 665, 29 L. Ed. 1013, after the defendant appeared and pleaded a defense on the merits, the case was set for trial before a jury. Defendant did not appear, and a verdict and judgment were rendered against him. The motion to set aside the judgment was based on inadvertence and neglect of the defendant's attorney, so the Court having acquired jurisdiction in defendant's person,

the judgment was a final judgment and not a void judgment. It was held the motion came too late when made after the term.

The opinion of Judge Mathews in *Jackson v. Heiser*, 111 Fed. (2d) 310 (cited on p. 13 of Appellants' Opening Brief), does not concern itself with the point at issue. There process was served in accordance with Rule 4(c) (d) (1), by leaving a copy of the complaint and summons at defendant's residence, "with a person of suitable age residing therein." Defendant did not plead and default judgment was taken. A month later defendant moved to set aside the entry of default and the motion was denied. Thereafter defendant stipulated with plaintiff for a hearing on the value of the property involved (it was a conversion suit), both agreeing that if the value was found to be less than set up in the default judgment, the judgment would be modified accordingly. In five months defendant's trustee in bankruptcy moved to vacate the judgment and set aside the default. The trial Court refused to set aside the judgment; defendant appealed, and the Court of Appeals held that the service was good and affirmed the judgment.

In *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 797, there was involved no question of a void judgment or of lack of legal service of process. On the contrary the case was tried, a verdict rendered and defendant paid the judgment. Seventeen years later on the application of plaintiff the trial Court set

aside the judgment to enable plaintiff to prove some items which he had overlooked in making proof at the trial. The Supreme Court held that the setting aside of this original judgment was error because done after the term and that any way the failure to discover error at the time of the trial was due to plaintiff's own negligence and there was no fact showing justifying the order.

U. S. v. Mayer, 235 U. S. 55, 59 L. Ed. 129, was a criminal case. The motion to set aside the judgment (based on bias of juror and misconduct of the prosecutor) was made after the term. The Court held the motion came too late, and in so holding declared, as did the Court in *Bronson v. Schulten* (supra) that state law could not give such power to Federal Courts.

In an effort to convince the Court that the default judgment rendered in this case, without a valid service of process, is not a void judgment, appellants herein, on page 14 of their brief, cite three decisions of the United States Supreme Court, to the effect that judgments of Federal Courts, even where jurisdiction is lacking, are not absolute nullities, namely:

Chicot County Drainage Dist. v. Baxter State Bank, 308 U. S. 371;

Stoll v. Gottlieb, 305 U. S. 165, and

Noble v. Union River Logging Co., 147 U. S. 165.

In the *Chicot* case (supra) the plaintiff offered in evidence, as "*res adjudicata*", a judgment rendered in another case involving readjustment of the liability

of bonds voted by holders of more than two-thirds of its bonds. The defendant bond holders, in the second case objected to the judgment on the ground that it was a nullity because, after the judgment became final, the Supreme Court in another case held the statute, under which readjustment took place, unconstitutional. The *Supreme Court* held the judgment was not invalidated by the subsequent declaration that the statute was unconstitutional; and declared that the District Court, even though a Court of limited jurisdiction, had

“authority when parties are brought before them *in accordance with the requirements of due process*, to determine whether or not they have jurisdiction to entertain the cause and for the purpose to construe and apply the statute under which they are asked to act. Their determination of such questions while open to *direct review* may not be assailed collaterally.” (Italics ours.)

And the Court emphasized the fact that it was dealing with cases in which there had been *an adversary trial* on the issue of jurisdiction by saying:

“The court has the authority to pass upon its own jurisdiction and the decree sustaining jurisdiction *against* attack, while open to direct review, is *res adjudicata* in a *collateral* action.”

In *Stoll v. Gottlieb*, 305 U. S. 165, 83 L. Ed. 104, a petition for reorganization of a corporation under Section B of the Bankruptcy Act was filed. Plaintiff, a creditor, was served with notice of the hearing. He

did not appear but *creditors of the same class* as plaintiff appeared and objected to the reorganization, but the Court after a hearing confirmed it. Plaintiff moved to vacate the decree of confirmation on the ground the Court had no jurisdiction to make such a decree. In a subsequent action in a state Court, the bankruptcy decree was pleaded as *res adjudicata*, but the Court held the decree was beyond the Court's jurisdiction.

The Supreme Court, in a decision by Justice Reed, upheld the bankruptcy decree as "*res adjudicata*" but in almost every sentence emphasized the fact that it was so holding because the decree was made following a trial on the merits. Some of the language making that emphasis is as follows:

"Where adversary parties appear, a court must have the power to determine whether or not it has jurisdiction of the person of a litigant."

* * * * * *

"After a Federal Court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of *res adjudicata* is made has not the power to inquire again into that jurisdictional fact."

The Court then speaks of "earlier determination on an actual contest over jurisdiction between the parties", and then says:

"After a party has his day in Court, with opportunity to present his evidence, and has view of the law, a collateral attack upon the decision there rendered merely retries the issue previously determined." (172)

and that

“a former judgment in a State Court is conclusive between the parties and their privies in a Federal Court *when entered upon an actual issue as to jurisdiction.*”

And to demonstrate without any question that the Court was giving “*res judicata*” effect to the bankruptcy decision *because* that decision as to jurisdiction was based upon a hearing between the adverse parties, it finally says with reference to a decision in another Court:

“The decision is inapplicable here because there was not an actually contested issue and order as to jurisdiction. The case is also distinguishable because the motion to vacate was made on the same bankruptcy proceedings as the order.”

In the case at bar the trial Court in rendering the default judgment against appellee, did not do so in an adversary proceeding, after a hearing, but rendered a default judgment without any jurisdiction over the person of appellee to support it.

In the third citation, *Noble v. Union River Logging Co.*, 147 U. S. 165, the Supreme Court held that a current Secretary of the Interior had no power to set aside an order of his predecessor in office in granting a right of way over public lands for a logging road, under an act of Congress empowering the Secretary of Interior to do so.

Appellants on page 16 of their brief cite the case, above discussed, as holding that the jurisdictional facts in the present case are merely quasi-jurisdictional and not subject to *collateral attack*. The cases do not so hold. For example, in the decision in the *Noble* case the Supreme Court lists as facts “strictly jurisdictional” and “without which the act of the court is a nullity”, the following:

“the service of process within the state upon the defendant in a common law action”

“A publication in strict accordance with the Statute, where the property of an absent defendant is sought to be charged.”

And the Court says as to a decision made without the presence of such facts “is a nullity, and its invalidity may be shown in a collateral proceedings.”
(173)

III (1).

ANSWER TO APPELLANTS' POINT THAT: "AN ATTACK ON A DEFAULT JUDGMENT MADE AFTER THE EXPIRATION OF 6 MONTHS' PERIOD PRESCRIBED IN THE FEDERAL RULES OF PROCEDURE IS A COLLATERAL ATTACK AND THEREFORE SUBJECT TO THE LIMITATIONS WHICH ARE APPLICABLE TO COLLATERAL ATTACKS.

(See Appellants' Opening Brief, p. 16.)

It is not exactly clear to us why appellants' counsel have given space to this portion of their brief, unless it is to establish that appellee's attack is a collateral one, and from that as a premise argue that we cannot

go beyond the record to establish the invalidity of the order. Such an argument would be a waste of time, for it is our contention that the record, without the aid of any evidence outside of it, shows that the trial Court never acquired jurisdiction of appellee.

However, the fact that appellants place emphasis on Rule 60 (b) of the Rules of Civil Procedure and upon Section 473 of the California Civil Code (the source of Rule 60 (b)), impels us to believe that appellant is here reviewing the earlier argument that appellee's motion is too late because not brought within the time limit of that rule and the Code section. With that point in mind we shall briefly analyze appellants' citations on the point.

In the first place Rule 60 (b) fixes a time limit only as to motions aimed at relieving a party from a default due to his or her "mistake, inadvertence, surprise or excusable neglect". The proceeding here is aimed at no such thing—it seeks to set aside a judgment void because the Court had no jurisdiction of the person of appellee defendant. The rule at its end carries a proviso that it does not limit the power of the Court to "(1) entertain an action to relieve a party from a judgment order or proceedings, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, a judgment obtained against a defendant not actually notified." But that provision has no bearing here either. It simply refers to the right of a defendant, under Section 57 of the Judicial Code (Title 28 U.S.C.A. 118), in an *in rem*

action, who has been served by publication only, to come in and enter his appearance in the action "at any time within one year after final judgment."

Section 473 of the California Code of Civil Procedure is to the same effect as Rule 60 (b). It places a six months' time limit on motions for relief from the applicant's "mistake, inadvertence, surprise or excusable neglect." It also recognizes the right of the Court *to set aside a void judgment without placing any time limit for so doing*. Section 473 (a) places a time limit on permitting a defaulted defendant, who has not been personally served, to answer—one year after rendition of judgment; but it makes no reference to void judgments, which as we shall hereafter show, can be set aside or ignored at any time, because they are nullities—*they are not judgments*.

Appellants' citations.

People v. Norris, 144 Cal. 422 (Appellants' Opening Brief, p. 17), is not at all in point because there the question of the sufficiency of the showing by the defendant was involved, while here we are concerned with the question whether a decree can stand in which the showing is not by affidavit, but by mere hearsay in affidavit form. It will be observed from page 422 of the report of the *Norris* case that the facts were similar to those in the affidavit in *People v. Wrin*, 143 Cal. 11, and were such as to bring the case within the rule laid down in *Rue v. Quinn*, 137 Cal. 651. The affidavits in the *Wrin* case and the *Quinn* case dis-

close the investigation made by the affiant. They contained the same affirmations, probably because in the latter of the two cases the affidavit in the first case was used as a pattern. Each affidavit showed that the **affiant** made inquiry of every one who might know of defendant's residence, and after diligent search defendant could not be found in the state (143 Cal. 13).

As we have shown, the search in the present case was made by an investigator hired by plaintiffs' counsel, and the "affidavit" merely recites the hearsay statement of the investigator as to what he did, which as was held in *Kahn v. Matthai*, 115 Cal. 689 and *In re Behymer*, 130 Cal. App. 200, 204 (analyzed later herein), was not proof by affidavit, and an order based thereon could not give the Court jurisdiction of the person of the defendant.

In *Irwin v. Scribner*, 18 Cal. 499, and *In re Griffith*, 84 Cal. 107 (Appellants' Br. p. 18), the Court merely held that where a verified probate petition recites residence of the decedent, the order admitting the will to probate cannot be attacked collaterally, because the record shows a "*prima facie*" case and the order therefore is not void. In the case at bar the *record itself* shows the trial Court acquired no jurisdiction.

Associated Oil Co. v. Mullen, 110 Cal. App. 385 (Appellants' Brief, p. 18), goes no further than to hold that a judgment may be attacked collaterally only where the want of jurisdiction appears on the face

of the record (389); but by way of dictum it declares that where (as is the case before the Court) the record shows a lack of jurisdiction, it is "*void upon its face*" and is attackable collaterally as well as directly.

In *Crouch v. Miller & Co.*, 169 Cal. 341 (Appellants' Brief, p. 18), the Court holds that if the record *on its face* shows jurisdiction, the resultant judgment cannot be attacked collaterally.

Appellants quote at considerable length from *Washko v. Stewart*, 44 Cal. App. (2d) 311 (Appellants' Brief, pp. 18-19), apparently with the idea of creating the impression that a motion such as appellee's in this case must be made within the one year time limit of Section 473(a) of the Code of Civil Procedure of California. Section 473(a) has nothing whatever to do with judgments *void upon their face*, as we shall later demonstrate by pertinent citations. Furthermore, the *Washko* case (*supra*) has nothing to do with a judgment void upon the face of the record. There the record *showed personal service*. It went even farther, it showed that defendant, after his default was taken, appeared and testified at the trial of the case, describing himself as a party, and made the application *specifically* under Section 473, two years after the default.

In *Smith v. Jones*, 174 Cal. 513, and the companion case of *Smith v. Bratman*, 174 Cal. 518 (Appellants' Brief, p. 19), the record of the default judgment showed personal service upon the defendant, and the

Court held that since the judgment was “valid on its face”, a motion to set it aside might be made within a reasonable time. The Supreme Court said in the latter case “*a judgment which is not void upon its face, may not be set aside on motion unless made within a reasonable time*” (emphasis ours), thus implying that if the judgment *were void on its face* the motion *did not* have to be made in any particular time.

Since the record in the case at bar *on its face* shows the judgment to be void through lack of the Court’s jurisdiction, it makes no difference whether the attack is direct or collateral, and it makes no difference how much time has elapsed since its entry.

**Lack of jurisdiction over the person
invalidates the judgment.**

We think it is apparent that there was no service of process on appellee, in that the order for publication was not in strict or any accordance with the statute, and therefore the entire proceeding, including the default judgment, was a nullity and attackable not only directly as we are attacking it, but even collaterally. We discuss the affidavit on pages 36-37 herein, and the law with reference to it on pages 35-36.

That a personal judgment of a Court is an absolute nullity if the record thereof upon its face discloses that jurisdiction of the person has not been obtained, is elementary. The reports abound in such decisions. For example: In *Earle v. McVeigh*, 91 U.

S. 503, 23 L. Ed. 398, the Supreme Court affirmed an order restraining the enforcement of a default judgment on the ground that through insufficient constructive service the defendant had no notice and the trial Court no jurisdiction. The opinion states that:

“Standard authorities lay down the rule, that in order to give any binding effect to a judgment, it is essential that the court should have jurisdiction of the person and the subject-matter; and it is equally clear that the want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced, or where any benefit is claimed under it, as the *want of jurisdiction makes it utterly void and unavailable for any purposes*. *Borden v. Fitch*, 15 Johns, 14.”

The same Court in *Thompson v. Whitman*, 18 Wall. 457, 21 L. Ed. 897, had earlier said:

“Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, the judgment, until reversed, is regarded as binding in every other court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable but simply void.”

Some years later the Supreme Court in *Scott v. McNeal*, 154 U. S. 34, 38 L. Ed. 896, quoted, as the law, Justice Field’s statement in *Pennoyer v. Neff*, that:

“The words ‘due process of law’ when applied to judicial proceedings mean a cause of legal

proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance.” *Pennoyer v. Neff*, 95 U. S. 714, 733.

A more specific statement of the rule is found in the opinion in *Harris v. Hardeman*, 14 Howard 333, 14 L. Ed. 444, viz.:

“* * * it would seem to be a legal truism, too palpable to be elucidated by argument, that no person can be bound by a judgment, or any proceeding conducive thereto, to which he never was party or privy; that no person can be in default with respect to that which it never was incumbent upon him to fulfill. The court entering such judgment by default could have no such jurisdiction over the person as to render such personal judgment, unless, by summons, or other process, the person was legally before it. * * * it has been settled, that a judgment depending upon proceedings in personam can have no force as to one on whom there has been no service of process, actual or constructive; who has had no day in court, and no notice of any proceeding against him. That with respect to such a person, such judgment is absolutely void; he is no party

to it, and can no more be regarded as a party than can any and every other member of the community.”

See to the same effect:

Old Wayne Mut. L. Assoc. v. McDonough, 204 U. S. 8, 17, 51 L. Ed. 345, 349.

A void judgment may be attacked at any time and in any manner.

If a judgment is *void* because made by a Court lacking jurisdiction, and the defendant has never had his day in Court, it would seem obvious that it could be attacked at any time whether during or after term; within six months or after six months from its entry.

Cases so holding are as follows:

Simonds v. Norwich Union Indemnity Co. (8th C.C.A.), 73 Fed. (2d) 412;

City of Stuart v. Green (5th C.C.A.), 91 Fed. (2d) 603, 604 (Cert. denied by Supreme Ct., 294 U. S. 711);

United States v. Turner (8th C.C.A.), 47 Fed. (2d) 86, 88;

Woods Bros. v. Yanktown Construction Co. (8th C.C.A.), 54 Fed. (2d) 304, 307;

Electro Therapy Products Co. v. Strong (9th C.C.A.), 84 Fed. (2d) 766.

In *Simonds v. Norwich Union Indemnity Co.* (supra) the Court of Appeals of the Eighth Circuit when considering the rights of a trial Court to col-

laterally impeach the record of a District Court, commented that,

“Of course, a court has inherent power, even after the expiration of the term, by proper order to correct clerical and inadvertent errors of judgment, plainly apparent in the record; *and a judgment showing itself upon its face to be a nullity, may be vacated at any time.*” Citing *Woods Construction Co. v. Yanktown County*, 54 Fed. (2d) 304. (415)

The same Court in the earlier case of *Woods Bros. v. Yanktown* (supra), very thoroughly considered the question of the power of a trial Court to set aside judgments which were void upon their face because of lack of jurisdiction. The Court there said:

“There are exceptions to the rule that a court cannot vacate a judgment after the term expires, etc., one of which is that where *upon its face* it is apparent that the judgment is a nullity the court may vacate it at any time. The oft-quoted case of *People v. Greene*, 74 Cal. 400, 16 P. 197, 199, 5 Am. St. Rep. 448, refers to such judgments as ‘a dead limb upon the judicial tree.’ ”

It then quoted from *Mellon v. St. Louis Union Trust Co., et al.*, 240 Fed. 359, 361, as follows:

“* * * ‘if that part of the decree was absolutely void and therefore subject to collateral attack, the court has the power to set it aside at any time, even after the expiration of the term.’ ”

In *United States v. Turner*, 47 Fed. (2d) 86, 88 (8th C.C.A.), the plaintiff sued the United States without its consent. The United States District Attorney answered. In the next term of Court the government moved to vacate the decree on the ground that there was a lack of jurisdiction because the United States had not consented to be sued. The trial Court refused to vacate the decree and the lack of jurisdiction appearing on the face of the record, the Court of Appeals revised the case ordering the decree vacated saying with reference to the power of the Court to set aside the decree after the term:

“A court has the inherent power to vacate its judgment or decrees which are rendered without jurisdiction, upon motion made either at the term at which the judgment is rendered or afterwards.” Citing *Pollitz v. Wabash R. Co.*, 180 Fed. 950; *Harris v. Hardeman*, 14 How. 334, 14 L. Ed. 444; *In re Demmitt* (C.C.A.), 221 Fed. 350; *Freeman on Judgments* §98; 38 *Corpus Juris*, 214, and other authorities.

The Court then quoted from *Freeman on Judgments*, Vol. 1, Sec. 117, as follows:

“* * * The first and most material inquiry in relation to a judgment or decree, then, is in reference to its validity. For if it be null, no action upon the part of the plaintiff, no inaction upon the part of the defendant, no resulting equity in the hands of third persons, no power residing in any legislative or other department of the government, can invest it with any of the ele-

ments of power or of vitality. It does not terminate or discontinue the action in which it is entered, nor merge the cause of action; and it therefore cannot prevent the plaintiff from proceeding to obtain a valid judgment upon the same cause, either in the action in which the void judgment was entered, or in some other action.”

The Court of Appeals of the Fifth Circuit in *City of Stuart v. Green*, 91 Fed. (2d) 693, ordered the setting aside of a decree on the ground that the trial Court lacked jurisdiction of the action, *after* the case had passed through an earlier appeal in which the question of jurisdiction was not raised.

California cases holding motion to set aside void judgments can be made at any time.

In view of the fact that appellants have accepted the decisions of our state Courts, because of the analogy of Section 473 of the Code of Civil Procedure to Rule 60(b) of The Federal Rules of Civil Procedure, we shall take the liberty of calling attention to a few California decisions which directly hold that a judgment void upon its face (as we trust we have demonstrated or will demonstrate is the case here), can be attacked at any time.

The California Supreme Court in *Estate of Smead*, 12 Cal. (2d) 20 at 25, says with reference to judgments void upon the face of the record:

“If the fatal defect is apparent from an inspection of the judgment roll it may be urged

upon either direct or collateral attack, and the asserted void portions may be lopped off as dead branches upon the judicial tree.”

The District Court of Appeal of the Second District of California, in *Michel v. Williams*, 13 Cal. App. (2d) 198, uses the identical language just above quoted, and also declares that

“The Court has power to vacate an order, *void upon its face, at any time* upon its own motion or upon motion of a party.” (Emphasis ours.)

In *Estate of Pusey*, 180 Cal. 368, 374, the heirs of a decedent contested a will on the ground that it had been revoked by decedent’s marriage subsequent to the execution of the will. The proponents countered with the claim that there was no valid subsequent marriage because the decree of divorce obtained by decedent, against the wife to whom he was married at the time the will was made, was void because the affidavit upon which the order for publication of summons was based failed to aver that due diligence had been employed to locate the defendant, etc.

The contestants objected to the attack on the divorce decree on the ground of laches and the statute of limitations.

But the Supreme Court disposed of the point decisively; determined it by holding that laches did not enter into the case because (quoting from an earlier decision):

“A judgment absolutely void may be attacked anywhere, directly or collaterally whenever it presents itself, either by parties or strangers. It is simply a nullity, and can be neither a basis nor evidence of any right whatever.” (Citing cases.)

The above decision was cited with approval in *Garrison v. Blanchard*, 127 Cal. App. 616, 620, in support of the statement: “Neither the doctrine of laches nor the bar of the statute of limitation has any application to a collateral attack upon a judgment void because of want of jurisdiction.” The Court also said that:

“As the judgment was void, the motion was properly granted, since there is no time limiting a collateral attack on a void judgment.” (621)

The rule was similarly stated in *Scoville v. Keglors*, 29 Cal. App. (2d) 66, 67, in the following sentence:

“It is undoubtedly true that when it appears on the face of the record that a judgment is without, or in excess of the jurisdiction of the court rendering it, the judgment may be collaterally attacked at any time.” (Citing *Harlan v. Harlan*, 154 Cal. 341, *Lieberman v. Superior Court*, 72 Cal. App. 18, and *Johnson v. Superior Court*, 128 Cal. App. 584.)

ANSWER TO APPELLANTS' POINT III (2) THAT: "DEFECTS IN AN AFFIDAVIT FOR THE PUBLICATION OF SUMMONS WHICH CONCERN THE MODE OF PROOF DO NOT MAKE THE JUDGMENT SUBJECT TO COLLATERAL ATTACK."

(Appellants' Brief, p. 20.)

Appellants start this part of their argument with a faulty premise—that the affidavit herein is being attacked because it contains defects. Such is not the case—we say that it is not an affidavit as that word is used in the statute involved.

Since appellee was never personally served, jurisdiction over her is dependent upon a valid constructive service—by publication. Congress through its expressly authorized agent, the United States Supreme Court, has declared that the state statute with reference to publication of summons shall be the medium through which the District Court of the United States shall acquire jurisdiction.

Rule 4(d)(7), Rules of Civil Procedure (28 U.S. C.A. 723c), provides that summons and complaint in a civil suit may be served in the manner prescribed by any statute of the United States, or

“in the manner prescribed by the law of the State in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the Courts of general jurisdiction of that State.”

As there is no Federal statute providing for service by publication, as was attempted here, one must look to California law, Section 412, Code of Civil Procedure, which reads in part as follows:

“Where the person on whom service is to be made * * * cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons * * * and the fact appears by affidavit to the satisfaction of the court; and it also appears by affidavit or by the verified complaint on file, that a cause of action exists against the defendant * * * such court * * * may make an order that service be made by the publication of summons. * * *”

The Court having selected “the law of the state”, as the method of securing jurisdiction over the person of a defendant in such an action as this, where service is to be by publication, we must look to the California Code section and its interpretation by the Courts of this State to determine whether jurisdiction was in fact obtained. It will be observed that appellants in their argument under this head, “fight shy” of California citations and, as we shall in a moment show, rely upon two United States Supreme Court decisions interpreting statutes and laws of other states.

Strict construction rule applies.

Since service by publication if properly carried out may result in a judgment against a defendant who has no suspicion that he or she has been served, and since such a service is in derogation of the common law, the Courts of California have consistently declared that the Code sections with reference to substituted service must be *strictly construed*. And that is

particularly just as to those cases where the published notice is in a "legal" newspaper, as in the case here (R. 61), for no surer method of concealing a notice directed to a layman could be found.

The following cases hold that unless the requirements of the code section are strictly followed, the Court does not acquire any jurisdiction over the defendant and the resultant default judgment is void.

Rickeston v. Richardson, 26 Cal. 149, 152;

Columbia Screw Co. v. Warner Lock Co., 138 Cal. 445, 446;

Braley v. Seaman, 30 Cal. 610, 616;

Gage v. Riverside, 156 Fed. 1002, 1004.

In *Rickeston v. Richardson* (supra) the California Supreme Court speaking of the sections of the Practice Act whence came our present Section 412 of the Code of Civil Procedure, said:

"Those sections are in derogation of the common law, and must be strictly construed *in order to give the Court jurisdiction* over the person of the defendant. A failure to comply with the rule there prescribed in any particular is fatal where it is not cured by appearance." (Italics ours.)

The Court then finds that an affidavit, which merely states in the language of the statute the ultimate fact that the defendant after due diligence cannot be found within the state, does not furnish evidence of the fact as contemplated by the code section, and does not confer any jurisdiction for the order of publication;

and finally the Court says that unless the proceeding are carefully scrutinized the code section

“may lead to gross abuses and the rights of persons and property made to depend upon the elastic conscience of interested parties, rather than the enlightened judgment of a court or judge.”

The same Court in *Columbia Screw Co. v. Warner Lock Co.* (supra) expressed the rule of strict construction of the code section, citing the *Richeston* case (supra) as a precedent; revised the judgment because of the insufficiency of the affidavit, upon which the order for publication was based, and declared that:

“When the statute uses the words ‘appears by affidavit’ it means more than an affidavit as to what some one told the party making the affidavit,”

and finally held that:

“The statutory basis for the order *must appear of record*, or the order is void,”

and that

“If the Court had no jurisdiction of the person of defendant should not be enforced in any manner.” (449) (Emphasis ours.)

Braley v. Seaman (supra) is likewise authority for strict construction of the statute as to the affidavit, and holds that where the section is not strictly followed, the resultant judgment is *void*.

Judge Wellborn in *Gage v. Riverside* (supra) emphasized the rule of strict construction of statutes

providing for substituted service, citing and quoting from among other decisions that of the Supreme Court of the United States in *Galpin v. Page*, 85 U. S. 350, 21 L. Ed. 959. (1005)

Appellants' citations analyzed.

In view of the facts that California law is expressly made applicable and that, as we have shown, under California law, an order based upon a hearsay affidavit is void, it is hard to see how interpretation of the laws of other states can be of any help to this Court in this case.

However, since appellants have cited several decisions in support of its argument on the point we shall take time and space to analyze those decisions.

In *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565 (Apps. Br. p. 20), plaintiff sued to recover possession of land, and defendant for possession relied upon a sheriff's deed secured at a sale following execution of a personal judgment against plaintiff, who was a non-resident and had been served by publication without any attachment upon property in the state in which the judgment was rendered. Plaintiff objected that the judgment was void because he was not personally served in the action in which it was rendered. The trial Court held that the judgment was void under this collateral attack, because the affidavit for order for publication of summons and the affidavit of publication contained *defects*. The Supreme Court rejected the trial Court's reasons for ignoring the earlier

judgment, but itself decided that the judgment was void because the process was not personally served and no jurisdiction over the defendant was ever obtained.

While as the Court stated (as quoted on Apps. Br. pp. 20-21), there was a difference of opinion in the Court as to whether a default judgment could be attacked collaterally because of defects in the affidavits. There is nothing in the opinion in *Pennoyer v. Neff* which indicates the character of the “defects” in the affidavit—*certainly nothing to indicate that it was attacked because it contained no competent evidence and was mere hearsay.*

Furthermore the case arose under the laws of Oregon and the Supreme Court was interpreting Oregon law in the light of decisions of Oregon Courts. Incidentally the *Pennoyer* decision contains language which emphasizes the need for strict interpretation—viz.:

“If, without personal service, judgments *in personam*, obtained *ex parte* against non-residents and absent parties, upon mere publication of process, which, in the great majority of cases, would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression.
* * *”

The Supreme Court, in *Thompson v. Thompson*, 226 U. S. 551, 57 L. Ed. 347 (Apps. Br. pp. 22-23) was dealing with the decision of a Virginia Court and the

interpretation of a Virginia statute with reference to the affidavit for publication of summons. The Virginia judgment was offered as “*res judicata*”, in a trial between the same parties in the Supreme Court of the District of Columbia. The affidavit merely stated on information and belief that the defendant “is not a resident of said state, as the (affiant) is informed and verily believes”.

The Supreme Court (as under the circumstances it was compelled to) looked to the laws of Virginia for guidance. The decision calls attention to the fact that the Virginia Court considered the affidavit sufficient, when it rendered its judgment; and that the Court (the Supreme Court) was not “referred to any provision of the Virginia Code, nor to any decision of the Courts of that state, that excludes the use of such evidence for such purpose”. It also called attention to two Virginia Code provisions expressly permitting information and belief affidavits.

True, the Court does, by way of obiter, make the remark, quoted on page 23 of appellants’ brief, to the effect that a defect in an affidavit for publication of summons does not invalidate the order. However, it cites, as its authority for its statement, four state decisions. Had the Court’s attention been called to the California cases of *Kahn v. Matthai* and *In re Behymer*, discussed by us on pages 34 to 36 of this brief, it would have had to admit that such was not the law in California. That the Supreme Court considered the state law paramount is evidenced by the

following language appearing toward the end of the decision (226 U. S. 566, 57 L. Ed. 353):

“* * * The affidavit in question set forth the fact; the circumstance that it was averred on information and belief affected merely the degree of proof. **In the absence of any local law excluding the use of such an affidavit**, the decision of the state court accepting it as legal evidence must be deemed sufficient, on collateral attack, to confer jurisdiction in that court over the subject-matter, in accordance with local laws.” (Emphasis ours.)

That the Federal Courts are bound by a state's interpretation of her own laws, where the state law applies, is elementary. We cite but one decision, that of *Brooks v. Burlington R. R.*, 101 U. S. 443, 25 L. Ed. 1057, 1061 (at end of opinion), in which the Supreme Court acknowledged that where an Iowa statute was to be interpreted, the Supreme Court was compelled to follow the Iowa Court's decision, although at variance with a former decision of its own.

There are three other citations in this section of appellants' brief, namely: *Florida Co. v. Schulte*, 103 U. S. 118; *Union P. R. Co. v. Mason City R. Co.*, 199 U. S. 160, and *U. S. v. Title Ins. & Trust Co.*, 265 U. S. 472, but they do not require any analysis as they merely hold that where a decision is rendered on two grounds the decision is considered as made upon each thereof.

A "hearsay affidavit" is not in compliance with the code section.

An affidavit which merely recites what someone told the affiant is not evidence, except as to the fact that the informant did so state to the affiant. The California Code section (Sec. 412, C. C. P.) requires that the fact that the defendant "cannot after due diligence be found within the state", or that the defendant "conceals himself to avoid service of summons", must "*appear by affidavit*".

Obviously hearsay evidence was not contemplated, for a hearsay affidavit, if false, could not constitute perjury as to the facts therein stated with reference to the diligence of search etc—for the affiant would merely be relaying what someone else told him, and his informant could not be guilty of perjury because his statement would not be under oath.

So we find the *California Supreme Court* to which we must look for interpretation of the state statute, declaring that a hearsay affidavit is not a compliance with the statute and cannot form the foundation for a valid order for publication of summons.

In the case of *Kahn v. Matthai*, 115 Cal. 689, that Court rejected, as a foundation for an order for publication of summons, an affidavit based upon hearsay. There the affidavit which was made by the plaintiff (to quote the Court):

"states in substance that plaintiff's attorney placed the summons and complaint in the hands

of five different persons (naming them) for service, and that they returned them with the information that they could not find defendant or see her and that she cannot be found in the City or County”.

The Court characterized that affidavit as

“but hearsay and may be wholly untrue without any impeachment of the truthfulness of the affiant”.

It then declared that

“We are of the opinion the affidavit was insufficient to uphold the order of publication of summons and hence that the Court below failed to obtain jurisdiction of the person of the defendant.”

In the case of *In Re Behymer*, 130 Cal. App. 200-204, the order for publication of summons was based upon another affidavit that closely resembled Herrington’s affidavit in this case, and the affidavit of the just-discussed *Kahn* case; the Court adopted as the test of the sufficiency of an affidavit, the question

“whether it is so clear and certain that an indictment for perjury may be sustained if it is false”. (p. 203.)

The affidavit in that case first declares that affiant employed one William D. McClafler of Los Angeles

“to ascertain the whereabouts of any of the defendants and is informed by him that he could

not find any of the officers of defendant and was informed that said corporation had defaulted its charter, and was not now in existence; that he had interviewed the City Assessor, Tax Collector and City Clerk of Long Beach, California, where said corporation had its principal office, and at the Alamitos Land Co. who owns property near the lot and could not learn from any of them the whereabouts of any of said defendants”.

The Court held the affidavit “insufficient” because every averment with reference to showing diligence was based upon information obtained from another, and, even if false, affiant could not be criminally liable for perjury. (204)

The affidavit in this case is hearsay and therefore inadequate to give Court jurisdiction.

The affidavit upon which the order for publication of summons was predicated will be found on pages 46 to 59 of the record. It was signed by one of appellants’ (plaintiffs’) counsel and is made up entirely of hearsay. It recites that he was advised by New York lawyers of a former address of defendant (R. 47); that he received other information by letter from the United States Marshal (R. 47); that he carried on a long correspondence with a process server in Los Angeles, named Gold, whom he had hired. Page after page of the affidavit recites what process server Gold wrote to the affiant. (R. 47-56.)

It is true that on page 57 of the record—after ten pages of describing what the Marshal and Gold told

affiant they had done, and after stating (R. 56) that “*In view of the foregoing* (which refers to hearsay statement of the Marshal and Gold) affiant and *plaintiffs’ attorneys have decided it would be futile to spend further time, effort and money in an attempt to effect personal service on said defendant*”, affiant does say “Defendant cannot, after due diligence, be found within the State of California, and cannot be personally served with process” and that “affiant and plaintiffs’ attorneys have made a diligent search for said defendant”.

But as was held in *Richeston v. Richardson*, 26 Cal. 149, 153 (cited elsewhere herein): “It was not sufficient to state generally, that after due diligence the defendant cannot be found within the state * * * but the acts constituting due diligence * * * should be stated”. Furthermore the above quoted statement from the affidavit (R. 56-57) discloses that the hearsay details constituted the “search” by affiant.

We do not believe an affidavit could be found in the books more afflicted with hearsay. The affidavit which the Supreme Court found insufficient in *Kahn v. Matthai*, 115 Cal. 689, 692, is quite similar, in that the diligence therein alleged was the diligence revealed in information obtained from five different persons, whom plaintiffs had employed to make service. In *In Re Behymer*, 130 Cal. App. 200, the hearsay information reported in the affidavit was from but one process server.

ANSWER TO APPELLANTS' POINT THAT: "(3) PLAINTIFFS HAVE THE RIGHT AT ANY TIME TO AMEND THE PROOF OF FACTS SUBMITTED FOR AN ORDER OF PUBLICATION."

(Appellants' Brief, pp. 25-31.)

Appellants, apparently realizing that the affidavit of Herrington for the order for publication of summons was insufficient, because hearsay, sought to save the default judgment by seeking leave of the trial Court to amend their showing by filing affidavits of Herrington's purported informants, the process-server Gold and the Deputy United States Marshal. The trial Court denied the right to file the affidavits.

As such a motion was necessarily addressed to the discretion of the trial Court there certainly was no error in the denial of appellants' motion.

Since the proof by affidavit based on direct evidence, rather than hearsay, was a necessary step toward giving the Court jurisdiction, it would be strange indeed if, after the default, the showing could be amplified to give jurisdiction "*nunc pro tunc*".

It would be just as reasonable to say that if a process-server served some papers other than a summons and complaint upon defendant, and a default were taken on his affidavit of service, the judgment could be validated by *thereafter* serving the defendant with the summons and complaint.

Since, as we have shown, the order of publication was void, and appellee was under no obligation to defend in the action, to even (if she had known of this

publication) permit an amendment to the affidavit showing, for the order of publication, would be greatly to the prejudice of appellee, because it would deny her the right to plead.

Not a single citation by appellants under this head had to do with an amendment as to matter going to the jurisdiction of the Court over the person of the defendant, but, on the contrary, every case cited deals with proceedings after jurisdiction has been obtained and under circumstances which did not prejudice the defendants.

Analysis of appellants' citations.

In *City of Salinas v. Lee*, 217 Cal. 252 (Apps. Br., p. 26), publication of summons had been regularly ordered, and publication of the summons for the prescribed period had been carried out, and jurisdiction over the person obtained. Through error the affidavit of publication failed to show the entire period of publication, and the Court permitted an amendment of the proof of publication.

In *Bley v. Dessin*, 31 Cal. App. (2d) 338 (Apps. Br. p. 26), jurisdiction was obtained by personal service of summons and complaint, and the parties appeared by demurrer. An amended complaint was filed and default judgment taken. Some question was raised as to the form of the affidavit of service and plaintiff was permitted to amend the proof of service.

In *In re Speirs*, 32 Cal. App. (2d) 124 (Apps. Br. p. 26) there was actual personal service and an error

in proof of service was corrected by amendment on the ground that "jurisdiction does not depend on proof of service but upon fact of service."

In *Alpha Stores v. You Bet Mg. Co.*, 18 Cal. App. (2d) 252, plaintiff was allowed to amend a return of a writ of attachment, which of course was after jurisdiction attached.

In *Herman v. Santee*, 103 Cal. 519 (Apps. Br. p. 26) personal service was made by a citizen of the United States over the age of eighteen years, and default taken. Defendant moved to set aside the default on the ground that the affidavit of service failed to show the server was over eighteen years of age and the Court held that an amendment to show the server was of age was permissible.

In *Allison v. Thomas*, 72 Cal. 562 (Apps. Br. p. 28) defendant was personally served with summons, and complaint and default judgment taken. Defendant later attacked the judgment on the ground that the affidavit of service failed to reveal that a copy of the complaint had been handed defendant. Plaintiff was permitted to amend his proof of service to cover the situation.

Appellants, on page 30 of their brief, concede that on their motion to amend they rely on *Rule 4(h) of The Rules of Civil Procedure*, which section reads:

"At any time in its discretion * * * the court may allow any process or proof of service to be amended, unless it appears that material prejudice would result to the substantial rights of the party against whom the process issued."

But the amendment they sought *was not for an amendment to process or proof of service*. If it had been such, the Court, by its exercise of discretion denied the motion. To have granted the motion would have (if within the Court's power, which it was not) resulted in prejudice to the substantial rights of appellee by creating a valid judgment out of a void one, without giving appellee the opportunity of pleading.

Appellants refer in the same connection to 28 U.S.C.A., Sections 767, 777, but they too deal only with amendments to *process*, and even then only where no prejudice is suffered thereby by defendant.

On page 30 of their brief, appellants cite two Federal trial Court decisions, *Erstein v. Rothchild*, 22 Fed. 61, and *Booth v. Denike*, 65 Fed. 43, each of which is concerned with amendments to attachment proceedings. That the amendments were allowed in those cases because jurisdiction had already been obtained, is clearly shown in the former decision by the following language:

“In the federal courts there must be jurisdiction over the person of the defendant and of a subject-matter, independent of the proceeding in attachment, and without which no attachment can be effectual. Everything pertaining to the attachment, therefore, arises and occurs in the course and progress of a pending suit, and is a mere matter of procedure in the exercise of a jurisdiction otherwise acquired. Any irregularity, omission, or defect, therefore, in that proceeding is

mere error, and does not and cannot affect the jurisdiction of the court; for that is acquired over his person by process served upon the defendant, and over his property attached by the actual seizure under the writ of attachment."

In *Mexican Central Ry. Co. v. Duthie*, 189 U. S. 76, 47 L. Ed. 715, plaintiff Duthie alleged residence in Texas but failed to allege the fact that he was a citizen of Texas and the United States. After verdict and judgment were rendered in his favor, he sought the right to and was allowed to amend his pleading to allege citizenship.

Appellants close their argument on this point with a quotation from *Dobie on Federal Procedure*, 1st Ed. p. 598, with relation to the power of Courts to permit amendments of writs, processes and pleadings.

But we are not here dealing with a proposed amendment of process.

ANSWER TO APPELLANTS' POINT THAT: "(4) IN A COLLATERAL ATTACK THE RECITALS OF THE JUDGMENT ARE BINDING AND CONCLUSIVE AS TO THE FACT OF SERVICE."

(Appellants' Brief, pp. 31-34.)

Appellants' first citation under this head shows how far afield its argument upon this point goes. As to the case at bar,—as we have shown heretofore, under the California statute with reference to the foundation for constructive service, the requirement as to the affi-

davit for an order for publication of summons is jurisdictional.

In *Ballard v. Hunter*, 204 U. S. 241, 51 L. Ed. 461, sufficiency of the proof of publication alone was involved, and the Court said:

“The act under which the proceedings were instituted does not require a warning order to be entered of record or on the complaint, and if it had the proceedings could not be attacked collaterally *unless such entry was made jurisdictional, as it was in Gregory v. Bartlett, 55 Ark. 30, and it was not in this case.*”

The answer to that is that under California law the requirement as to the affidavit, which precedes an order for publication, *are made jurisdictional.*

In *Kaufman v. California Mining Synd.*, 16 Cal. (2d) 90, a *true collateral* attack was made upon a judgment in another case, in which the service was attempted (1) by publication, (2) by service upon the Secretary of State, and (3) by attachment. The Court held that the recitals of service in the judgment were conclusive in a collateral attack, where it does not affirmatively appear in the record that the findings of due service were predicated upon any particular document or evidence.

The opinion mentions that the judgment was safe from collateral attack even though there may have been “defects in some of the documents constituting part of the judgment roll and relating to the service

of summons.” Incidentally, the Court was forced to concede in that case that, if the invalidity of the order appears on the face of the record, the order is void; for the opinion states that a *collateral attack* “must fail *unless* the invalidity of that judgment affirmatively appears upon the face of the judgment roll.”

We are dealing with the sufficiency of the proof *upon which the order for publication was based*, and the Code (C. C. P., Sec. 412) prescribes proof by *affidavit only*. That such is the intention of the statute is also demonstrated by the fact that under Section 670, California Code of Civil Procedure, the judgment roll “in case the service so made is by publication” shall contain “*the affidavit for publication of summons and the order directing the publication of summons.*”

Even a sheriff’s return cannot be considered, unless in affidavit form. It was directly so held in *Grigsby v. Wopschall*, 127 N. W. 605.

The *Kaufman* case deals only with proof of service of summons.

Musser v. Fitting, 26 Cal. App. 746 (Appellants’ brief, p. 33), is not at all in point, because there the Court was dealing with the service of summons, and not with the affidavit required by Section 412 of the Code of Civil Procedure. The point was raised, by way of a collateral attack in another action. The Court held that the recital of due service must be taken as true, “unless the record affirmatively shows

the facts upon which it is based to be untrue" (751), and the Court comments that there might have been other proof of service of an admission of service (751).

In the case at bar, the default judgment is by the clerk and is based upon an affidavit of Harrington that service was by publication pursuant to the Court's order of January 16, 1939, and that affidavit is a part of the record. (R. 65-66)

The long quotation taking up all of page 34 of appellant's brief, is from *City of Salinas v. Lee*, 217 Cal. 255. There the Court was dealing with the sufficiency of an affidavit of publication—the actual service. The Court in its opinion calls attention to the recital of due service, and comments that it did not appeal from the record that "said recital was at all based upon the original and deficient affidavit". (256)

But with the reference to the showing *for the order for publication*,—with which we are here involved—the proof *must be by affidavit and the judgment roll must contain the affidavit, which it does*. (C.C.P., Secs. 412 and 670.)

ANSWER TO APPELLANTS' POINT THAT: "(5) HERRINGTON'S AFFIDAVIT WAS SUFFICIENT UNDER CALIFORNIA PRACTICE TO SUSTAIN THE ORDER FOR PUBLICATION OF SUMMONS."

(Appellants' Brief, p. 35.)

The burden of appellants' argument under this head is that if there was any evidence in the affidavit, even though not at all conclusive, the trial Court had a right to pass on the sufficiency of the affidavit and that if it was wrong, appeal was the only remedy.

Appellants' citations.

Their main reliance is the decision in *Forbes v. Hyde*, 31 Cal. 342, which is cited as authority for the proposition that if the affidavit has any evidence in it, the order is not *void* and can be attacked only by appeal. However, a careful reading of that case destroys appellants' argument.

It will be borne in mind that the cases of *Kahn v. Matthai*, 115 Cal. 689 and *In re Behymer*, 130 Cal. App. 200, heretofore cited and discussed by us, are directly in point, and declare that an affidavit based upon hearsay is not legal evidence, and an order based thereon is absolutely void and subject to attack anywhere and at any time.

Forbes v. Hyde, supra, while not directly in point, contains language which clearly supports the latter (in point of time) cases just cited. Throughout the decision the Court emphasizes the fact that the affidavit made to obtain an order for publication must contain "*legal evidence*," and that if this legal evi-

dence does not appear in the affidavit, the order is void. The Court also held that:

“A judgment absolutely void upon its face may be attacked anywhere, directly or collaterally, whenever it presents itself, either by parties or strangers. It is simply a nullity, and can be neither the basis nor evidence of any right whatever. A judgment against a party over whose person the court has not acquired jurisdiction is void for want of jurisdiction.” (347)

The quotation from that opinion contained on page 35 of appellants’ brief, emphasizes the fact that the order, to be valid, must be based upon, as it states, “appreciable evidence of a legal character,” and again the Court mentions that the proof has to have a “legal tendency to make out a proper case, in all its parts, for issuing the process.” And again on page 350 of the report,

“The fact must appear by affidavit before jurisdiction to make the order attaches. That is to say, there must be an affidavit containing a statement of some fact which would be legal evidence, having some appreciable tendency to make the jurisdictional fact appear, for the judge to act upon before he has any jurisdiction to make the order.”

The Court then goes on to say:

“That without such evidence, the proceedings are void, but that if the affidavit presents *legal evidence* which has an appreciable tendency to prove every material jurisdictional fact the order is not subject to collateral attack.”

On page 353 of the report, it is said with emphasis that jurisdiction must appear by affidavit.

Finally the Court says:

“The application for the order is made *ex parte*, the defendant is not heard, and has no opportunity to object to the kind of proof offered. He thereby waives nothing by failure to object, and it behooves those who are seeking to acquire jurisdiction over him to see that they represent *legal testimony* which tends in some degree to establish the essential jurisdictional facts.” (355) (All emphasis ours.)

There are three other citations by counsel under this head:

City of Salinas v. Lee, 217 Cal. 252;

Ligare v. California S. R. R. Co., 76 Cal. 610;

Rue v. Quinn, 137 Cal. 651.

We have already elsewhere discussed the *Salinas v. Lee* case. The *Ligare* case (*supra*) precedes considerably in point of time the directly pertinent decisions in *Kahn v. Matthai* and *In re Behymer*, *supra*. The affidavit therein for the order of publication stated that the *affiant* had made a diligent search, and it reported all *affiant* had done in the way of search, which was to make inquiry of all persons from whom he could expect to obtain information as to the residence of said defendants. It was held that this was sufficient upon collateral attack. While the evidence offered by the affidavit was meager, it went beyond the mere words of the statute, and it reported the personal

investigation made by the affiant and therefore was not hearsay, as is the affidavit in the case here.

In *Rue v. Quinn*, supra, the affidavit, as in the *Ligare* case, recited an investigation conducted by the affiant himself, to the effect that he had made due and diligent search and inquiry for the defendants by inquiring for each of them of several prominent county officers, naming them and made inquiry of all persons from whom he could expect to obtain information, as to the residences and whereabouts of defendants. This clearly was not a hearsay affidavit, even though information that he might obtain from acquaintances of defendants might be hearsay. In fact the Court stated as to the affidavit,

“It was shown that the plaintiff was absent from the country wherein the affiant resided and that all of the facts verified *were within the knowledge of the affiant.*” (Emphasis ours.)

In the affidavit in the case at bar, the investigation was carried on in Los Angeles by others than affiant, and affiant merely related what they had written him that they had done. It is just as though he had merely presented the letters without making an affidavit. So it is very clear that *Rue v. Quinn* is not at all in conflict with the cases cited by us, and does not support the contention of appellants herein that the affidavit is sufficient.

Appellants are conscious of the fact that a hearsay affidavit is not a sufficient basis for an order of publication, because on page 38 of their brief they seek to

avoid the hearsay character of the affidavit, by quoting therefrom an outright statement that affiant "and said attorneys" had made a diligent search, etc. But they conveniently overlooked the fact, which we have called to the Court's attention earlier in this brief, that Herrington prefaced that statement in his affidavit by the following:

"That in view of the foregoing (the hearsay statement of process server Gold) affiant and plaintiffs' attorneys have decided it would be futile to spend further time, effort and money in an attempt to effect personal service of process on said defendant." (R. 56-57.)

ANSWER TO APPELLANTS' POINT THAT "APPELLEE HAS MADE NO PROOF THAT WITH DUE DILIGENCE SHE COULD HAVE BEEN FOUND IN THE STATE OF CALIFORNIA OR THAT SHE DID NOT CONCEAL HERSELF TO AVOID SERVICE OF PROCESS".

(Appellants' Brief, p. 38.)

We do not consider this point worthy of serious reply. This case stands or falls on the sole question of whether the trial Court in the first instance had jurisdiction to issue the order for publication of summons. If the affidavit is insufficient as held in *Kahn v. Matthai* (supra), and "*In re Behymer*," the order was void and the trial Court very properly set it aside.

Incidentally appellee very definitely declared in her affidavit filed in support of her motion to set aside

the default judgment—that she resided in Los Angeles, never concealed herself and never refused to answer the door bell. (R. 76.)

ANSWER TO APPELLANTS' POINT THAT "(7) A DEFENDANT WHO CONCEALS HERSELF TO AVOID SERVICE IS ESTOPPED FROM CLAIMING DEFECTS IN THE SERVICE BY PUBLICATION."

(Appellants' Brief, p. 39.)

This point of appellants is supported neither in fact nor by appropriate citation. There is no evidence of concealment. The hearsay statements of process server Gold, not made under oath, are certainly not evidence of such a fact. Appellee by her affidavit directly denied the fact. There is no evidence that appellee knew of the pendency of the proceedings.

The question of the sufficiency of the affidavit as a basis for the order of publication, is the only question this Court has to pass on, in this connection.

The three cases cited by appellants, namely, *Boland v. All Persons*, 160 Cal. 486, *Hiltbrand v. Hiltbrand*, 218 Cal. 321, and *Collins v. Streitz*, 47 Ariz. 146, have nothing to do with the point. The two California cases cited relate to applications by defendants regularly and legally served by published summons, for leave to appear under Section 473a of the California Code of Civil Procedure.

We cannot see how they apply here.

APPELLANTS' POINTS III (8) (a) (b) AND (c).**(Appellants' Brief, pp. 40-50.)**

In the trial Court appellee raised the point that the order of publication was invalid because among the other reasons hereinbefore mentioned, it failed to direct service by mail to the last known residence of the defendant (appellee). After reading appellants' citation, *Ligare v. California S. R. R. Co.*, 76 Cal. 610, 614, we were convinced that point was not good and so advised the trial judge while the motion was pending before him.

In appellee's motion in the trial Court we included a prayer that the action be dismissed on the grounds that: (1) the Court had no jurisdiction because the liability of appellee to any one of appellants was not of the proper jurisdictional amount and (2) the action was brought in the wrong district because appellee does not reside in this judicial district.

We are not standing on either of those grounds. It therefore becomes unnecessary to answer appellants' arguments upon those points.

IV.

ANSWER TO APPELLANTS' POINT THAT: "THE DISTRICT COURT HAD NO JURISDICTION TO QUASH SERVICE OF SUMMONS AND ITS ORDER TO THAT EFFECT WAS IN ERROR.

(Appellants' Brief, p. 51.)

Appellants here argue that the judgment has become final and the District Court had lost jurisdic-

tion; citing *Bronson v. Schulten* (supra) and *United States v. Mayer* (supra). We believe we have already demonstrated that the default judgment was *void*; that a void judgment never becomes final, and that the trial Court never loses the power to upset it.

Appellants next make the remarkable suggestion that by ordering appellee to file an answer, the trial Court expressed its belief that appellee was properly before the Court, and that quashing service of summons was an idle act.

The order setting aside the default gives defendant (appellee) 30 days from the date in which to answer the complaint herein. The only significance in that fact, as appellants' counsel well know, is that in defendant's closing brief before the trial Court we said:

“All we are asking here is an opportunity to defend against plaintiffs' complaint. Defendant stands ready to defend against the action if the default judgment is set aside.”

V.

ANSWER TO APPELLANTS' POINT THAT "APPELLEE BY MAKING HER MOTION TO DISMISS, BY PLEADING MATTERS CONCERNING THE MERITS OF THE CASE AND THE COURT'S JURISDICTION OF THE SUBJECT MATTER, VOLUNTARILY SUBMITTED HER PERSON TO THE JURISDICTION OF THE DISTRICT COURT AND WAIVED THE RIGHT TO RELY ON THE DEFENSE OF IMPROPER SERVICE."

(Appellants' Brief, p. 51.)

The judgment against appellee based upon the publication of summons was either void or valid. If it is valid, the case at the time of appellee's motion was no longer pending, and any motion to dismiss the proceedings on any ground would have been a futile act. If it is a void judgment it is as though no order of publication was ever signed and the case was still pending when appellee made her motion.

Consequently appellee's prayer for a dismissal of the action on the ground that it was brought in the wrong district, or that the claim thereof was outlawed could not be an admission that the published service upon her was good, but on the contrary would have to be predicated upon the assumption that the default judgment was void and the action was therefore still pending and the complaint still pleadable against.

However the point is set completely at rest, by the *Federal Rules of Civil Procedure*. Rule 12(b) provides:

"Every defense, in law or fact, to a claim for relief in any pleading, * * * shall be asserted in

the responsive pleading thereto if one is required, except that the following defenses may *at the option of the pleader* be made by motion: (1) lack of jurisdiction over the subject matter, (2) *lack of jurisdiction over the person*, (3) improper venue, (4) *insufficiency of process*, (5) *insufficiency of service of process*, (6) failure to state a claim upon which relief can be granted. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. *No defense or objection is waived by being joined with one or more other defenses or objections, in a responsive pleading or motion. * * *.*" (Emphasis ours.)

While the foregoing rule is too clear and definite to require interpretation, we take the liberty of quoting from the decision of a New Jersey District Court, in *Orange Theatre Corp. v. Rayherstz Amusement Corp.*, 2 Fed. Rules Decs. 278, the following pertinent language:

"The new rules have avoided all distinction between demurrers, motions, exceptions for insufficiency and pleas. Special appearances to challenge jurisdiction over the defendant or that the venue is improper may be pleaded in the answer and the defendant waives nothing by so doing."

Appellants cite three California cases under this head, namely, *Raps v. Raps*, 20 Cal. (2d) 382; *Olcese v. Justice's Court*, 156 Cal. 82, and *Security Loan Co. v. So. Riverside Fruit Co.*, 126 Cal. 418. Those cases are clearly distinguishable from our case, but inasmuch as

the Federal Rules control the situation we shall refrain from a discussion of them.

CONCLUSION.

We believe the sources and precedents cited in this brief establish that the default judgment against appellee and in favor of appellants is absolutely void, and that the trial Court did not err in setting it aside.

Dated, San Francisco,

July 2, 1943.

Respectfully submitted,

SULLIVAN, ROCHE, JOHNSON & FARRAHER,

Attorneys for Appellee.

No. 10,381

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

JAMES W. BUTLER, et al.,

Appellants,

VS.

GRACE APPLETON McKEY,

Appellee.

**APPELLEE'S PETITION FOR A REHEARING
AND BRIEF IN SUPPORT THEREOF.**

SULLIVAN, ROCHE, JOHNSON
& FARRAHER,
THEO. J. ROCHE,
HIRAM W. JOHNSON,
THEODORE H. ROCHE,
GEORGE A. STOCKFLETH,
JAMES FARRAHER,

Mills Tower San Francisco.

*Attorneys for Appellee
and Petitioner.*

FILED

OCT 8 - 1943

**IN THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT**

JAMES W. BUTLER, MARY L. BUTLER, MARY SEGUIN,
CLARA VERSCHOOR, LILLIAN FITZGERALD, DAVID J.
LEWIS, ELIZABETH A. LEWIS, JOHN LINGIE SMITH,
ELLA RUTH SMITH, PATRICK J. LEONARD, ANNIE
LEONARD, STEPHENS C. PERRY, CARLE HILLE-
BRAND, MRS. C. C. E. HILLEBRAND, FRED HUSSEY,
MRS. H. L. GOOCH, OSCAR SWANSON, MARVIN WAL-
TER WAFER, GEORGE W. IRVINE, BETTY DU BOIS,
MRS. I. B. BRAWLEY, MARGARET JOHNSTONE, JAMES
J. PHELAN, J. H. PEGRAM, MRS. J. H. PEGRAM,
MARIE C. KNIEF, AMOS WASHINGTON, DOROTHY
LEWITZ, MARIE C. CROSS, VIOLETTE M. CROSS,
CHARLES L. FORSBERG and MADGE MCNAUL,

Appellants,

vs.

GRACE APPLETON McKEY,

Appellee.

No. 10,381

Sep. 8, 1943

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division.

Before: DENMAN, MATHEWS and STEPHENS, Circuit
Judges.

STEPHENS, Circuit Judge.

Plaintiffs appeal from an order of the district court, granting a motion to quash service of summons on defendant, appellee herein, and vacating the default judgment entered against her, which order was made after the expiration of the period set aside for questioning a judgment directly.

Plaintiffs filed a creditors' bill in the District Court of the United States for the Northern District of California on Novem-

ber 19, 1936. The suit was based upon the statutory stockholders' liability of defendants as shareholders of the Woodlawn Trust and Savings Bank, an Illinois corporation. All of defendants, but none of plaintiffs, were citizens and residents of California. Some of defendants, including appellee herein, resided in the Southern District of California. Appellants in January of 1939 made a motion requesting an order for the publication of summons upon appellee on the grounds that appellee could not after due diligence be found within the state or within the jurisdiction of the court and that appellee was concealing herself to avoid service of summons. The motion was supported by an affidavit signed by Fred S. Herrington, one of plaintiffs' attorneys. The affidavit outlined in detail the efforts made by the United States Marshal at Los Angeles to effect service which acts were recounted in letters to affiant, noted that the original subpoena was filed with the clerk, and made reference to the same for further particulars and to the marshal's return affixed thereto. The return consists of a certification by each of three deputy marshals that on a certain day, different in each case, he received the subpoena ad respondendum and that after diligent search he was unable to find appellee. The affidavit then related what had been reported to affiant as to the numerous attempts to effect service of Leo K. Gold, an attorney appointed by the court to serve upon appellee the subpoena ad respondendum as well as any alias or other subpoena. It referred to unsuccessful inquiries made by a Los Angeles law firm to serve appellee in another proceeding. There followed a paragraph containing in effect the following statements: that, in view of the foregoing, plaintiffs' attorneys realized the futility of further endeavor; that Grace McKey could not after due diligence be found within the state; that affiant was informed and believed and therefore alleged as a fact that Grace McKey was concealing herself to avoid service; that affiant and plaintiffs' attorneys had made a diligent search for appellee and had inquired of everyone from whom they could expect to receive information as to appellee's whereabouts; and that they did not know and could not learn her whereabouts except that they were informed and believed and therefore alleged as a fact that appellee was residing in California.

The court ordered publication of summons. The order declared: "it further appearing to the satisfaction of the Judge from said affidavit and from other evidence, and the Court finds * * * that diligent search has been made for said defendant Grace Appleton McKey in the State of California and within the jurisdiction of this Court in order to serve said subpoena and said alias subpoena upon her, and that said defendant cannot, after due diligence, be found within the State of California or the jurisdiction of this Court, and that said defendant has been and now is concealing herself to avoid the service of said process * * *." The proper steps having been taken to accomplish service by publication, a judgment by default of the clerk was entered on April 18, 1939. Included therein was a recital that the defendant Grace Appleton McKey had "been duly and regularly served with summons."

In 1942, more than three years after entry of judgment, appellee moved the court to quash service of summons setting up as one ground that the court had no jurisdiction to order the publication of summons as the affidavit upon which the order was based contained facts predicated upon hearsay. The court granted the motion and vacated the default judgment. At the same time it denied appellee's motion to dismiss and appellants' motion to file additional affidavits concerning the attempted service. Appellants appeal from the order of the district court except insofar as it denies the motion to dismiss the action.

Although the original action was commenced in 1936, the motion requesting an order for the publication of summons was not made until 1939 and therefore, under the provisions of Rule 86, is governed by the Federal Rules of Civil Procedure. Rule 4 (d) (7) decrees that service upon an individual such as appellee can be accomplished according to any statute of the United States or according to the law, relative to actions in courts of general jurisdiction, of the state in which service is made.

For the reason that the method used herein followed the terms of § 412 of the California Code of Civil Procedure, we treat first of the California law. The cited section provides: "Where the person on whom service is to be made * * * cannot, after due

diligence, be found within the State; or conceals himself to avoid the service of summons; * * * and the fact appears by affidavit to the satisfaction of the court * * *; and it also appears by such affidavit or by the verified complaint on file, that a cause of action exists against the defendant * * *, such court * * * may make an order that the service be made by the publication of the summons * * *."

The California decisions are not entirely clear as to the effect of hearsay statements in an affidavit in support of an order for publication of summons. A statute defining service in such manner must be strictly construed, *Galpin v. Page*, 85 US 350; *Braly v. Seaman*, 30 Cal. 610, and the facts showing exactly what means were taken in the exercise of due diligence must be set forth in the affidavit, *Ricketson v. Richardson*, 26 Cal. 149. The instant motion must be considered under the principles applicable to a collateral attack, for, although it is a direct attack, the motion was presented after the time for a direct appeal had expired, *City of Salinas v. Luke Kow Lee*, 217 Cal. 252. It is a basic rule that a judgment is void and subject to collateral attack if a lack of jurisdiction in the court appears on the face of the record. Therefore, the question involved herein is whether the default judgment was void on its face as showing that the court therein acquired no jurisdiction over the person of appellee by means of the published summons.

It seems evident that in California an affidavit based on information and belief would support an order for publication of summons. Two California Supreme Court decisions very definitely hold that the hearsay nature of facts stated in an affidavit may be considered by the judge in drawing his conclusion as to due diligence, but that such a hearsay affidavit does not automatically render the judgment void, *Rue v. Quinn*, 137 Cal. 651; *Ligare v. California Southern Rr. Co.*, 76 Cal. 610. Directly contra to this principle is *Kahn v. Matthai*, 115 Cal. 689, and perhaps *Columbia Screw Co. v. Warner Lock Co.*, 138 Cal. 445. The Kahn case determined that an affidavit containing hearsay as to the exercise of due diligence was insufficient to uphold an order for publication. It involved a direct appeal from the judgment questioned. It mentioned the fact that an affiant cannot be held responsible for the truthfulness of hear-

say statements in an affidavit. The California District Court of Appeal in *Application of Behymer*, 130 Cal.App. 200, followed the reasoning of the *Kahn* case explicitly and on a collateral attack held a prior judgment void. However, in the meantime in *Rue v. Quinn*, *supra*, the Supreme Court had restricted the effect of the *Kahn* case to circumstances where a direct appeal was taken from the judgment questioned.

The California cases support the conclusion that on a direct appeal from a judgment an affidavit based upon hearsay will be found fatally defective, and the judgment will be ordered reversed. However, on a collateral attack or on a direct attack after the expiration of the period for appeal the affidavit will be found sufficient, and the judgment will not be held void. The comparison was clearly drawn in the early case of *Forbes v. Hyde*, 31 Cal. 342, 348: "There is a marked distinction between an affidavit which presents some evidence on a vital point, but clearly of a character too unsatisfactory to justify an order for publication of summons based upon it, and an affidavit which presents no evidence at all tending to prove the essential fact. In the former case the judge might be satisfied upon very slender and inconclusive testimony; but there being some appreciable evidence of a legal character, which calls into action the judgment of the judge, he has jurisdiction to consider and pass upon it. He may be wholly and egregiously wrong in his conclusion upon the weight of the evidence, but he has jurisdiction to act upon it, and his action is simply erroneous. His order would, in such case, be reversed on appeal. * * * Such a judgment could not be collaterally attacked."

As heretofore stated, the affidavit in the instant case contains more than statements based upon hearsay. It alleges that affiant and plaintiffs' attorneys "have made a diligent search for said defendant and have made inquiries of each and every person whom they could expect, or had any reason to believe they would receive, information as to the whereabouts of said defendant," and is in other respects similar to the affidavit held sufficient on collateral attack in *Ligare v. California Southern Rr. Co.*, 76 Cal. 610. Furthermore, it refers to the return of the United States Marshal and therefore incorporates positive statements from at least three individuals as to their inability

to find appellee. Therefore, the affidavit would adequately support the order of publication of summons upon appellee, and the default judgment against her would be valid in California.

The result under the federal decisions would be the same. *Thompson v. Thompson*, 226 US 551, 556, involved a situation closely analogous. There the Supreme Court, after concluding that an affidavit made wholly on information and belief was a sufficient basis for an order for publication of summons under Virginia law, set forth as an additional ground for its decision that even though the Virginia law were otherwise, the judgment might be erroneous but would not be void on its face where the affidavit was defective "not in omitting to state a material fact, but in the mode of stating it or in the degree of proof." The Supreme Court remarked in *Pennoyer v. Neff*, 95 US 714, that defects in an affidavit supporting an order for publication of summons cannot be utilized to impeach a judgment collaterally but only to question it on appeal. The court looked to the return of the marshal as well as the affidavit, under a statute similar to the California statute, in *Marx v. Ebner*, 180 US 314, and mentioned the presumption that a public officer has done his duty and has conducted the diligent search required. Should a like practice be followed in the instant case, the marshal's return in the record would constitute a direct statement of due diligence.

The argument is not tenable that a perjury charge cannot be sustained against an affiant who sets forth hearsay matter as fact. In a situation where no specific information has been imparted to him, if a man swears that he has received such information, and if he swears that because of such information, a defendant could not with due diligence be found or a defendant was concealing himself to avoid service, he subjects himself to liability for perjury, for he has corruptly made a positive statement. *Cohen v. Portland Lodge No. 142, B.P.O.E. (CCA 9)*, 152 Fed. 357.

Reversed.

(Endorsed:) Opinion. Filed Sep. 8, 1943. Paul P. O'Brien, Clerk.

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No. 10,381

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES W. BUTLER, et al.,

Appellants,

VS.

GRACE APPLETON McKEY,

Appellee.

APPELLEE'S PETITION FOR A REHEARING AND BRIEF IN SUPPORT THEREOF.

*To the Honorable Curtis D. Wilbur, Presiding Judge,
and to the Associate Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:*

Comes now Grace Appleton McKey, the appellee in the above entitled cause, and presents this, her petition for a rehearing of said cause upon the grounds hereinafter set forth.

INTRODUCTION.

Because practically no defendant (unless he is a confirmed reader of legal periodicals) ever sees the published summons aimed at him or her, and judg-

ments thereon are made without the suspicion of the judgment debtor that he or she has even been served, our State Legislature has required strict proof by *affidavit*, as an essential jurisdictional basis for the order directing publication of summons.

In the present case the causes of actions included in the complaint were all outlawed. The indebtedness, according to the complaint, was incurred June 22, 1932 (R. 21), and the action was filed November 19, 1936. (R. 31.) The statute of limitations is of course that of the forum. The action was on a statutory stockholder's liability and the causes of action therefore became outlawed (under Sec. 338 of the California Code of Civil Procedure) in three years, or one year and five months before it was filed. Appellants, doubtless, filed the action with a hope and prayer that anyone served would not consult a lawyer or that on published service there would be no appearance.

Here appellants took judgment against appellee for \$110,000.00, without her knowledge that she had ever been served (R. 76), when, had she known of the service, by merely appearing she could have walked out of Court with her costs and no judgment against her.

GROUND'S FOR A REHEARING.

We know that if this Court can be convinced that in reversing the trial Court's order setting aside the

default against appellee, it has incorrectly determined the law point involved, it will without hesitation grant a rehearing of the cause.

We believe that the opinion of this Court is plainly in error in the following particulars:

(1) After determining that the law of this State as to publication of summons governs, it adopts as the law applicable with reference to the hearsay affidavit, upon which the order for publication of summons was predicated, two decisions of the Supreme Court of California reported respectively in Vols. 76 and 137, California Reports, and concedes that the same Supreme Court in a *later* decision reported in 138 Cal. Rep. is “perhaps directly contra”.

(2) It adopts language from the affidavit of Fred S. Herrington, upon which the order for publication of summons was based, as describing the activity of the affiant, whereas that language when interpreted in the light of the affidavit as a whole becomes a mere conclusion drawn from the facts related earlier in the affidavit by way of hearsay; and in so doing it ignores the fact that appellant in its opening brief declares otherwise and the trial Court found otherwise.

(3) It ignores that portion of the affidavit in which the affiant recites on information and belief that no certificate of residence had been filed by appellee with the Recorder of the City and County of San Francisco (to which we particularly directed attention in the oral argument), a fact which *must*

be alleged before jurisdiction can attach and which under the unconflicting authority must be made directly and upon positive oath.

I.

THE COURT IN ITS OPINION HAS ADOPTED AS THE LAW OF CALIFORNIA A DECISION OF THE SUPREME COURT THEREOF WHILE ADMITTING THAT A LATER DECISION OF THE SAME COURT HOLDS TO THE CONTRARY.

The Opinion.

On page 4 of its opinion this Court said:

“It seems evident that in California an affidavit based on information and belief would support an order for publication of summons. Two California Supreme Court decisions very definitely hold that the hearsay nature of facts stated in an affidavit may be considered by the judge in drawing his conclusion as to due diligence, but that *such a hearsay affidavit does not automatically render the judgment void*, *Rue v. Quinn*, 137 Cal. 651; *Ligare v. California Southern R.R. Co.*, 76 Cal. 610. *DIRECTLY CONTRA* to this principle is *Kahn v. Matthai*, 115 Cal. 689, and *perhaps Columbia Screw Co. v. Warner Lock Co.*, 138 Cal. 445.” (Emphasis ours.)

If, as the Court said above, the decision of *Columbia Screw Co. v. Warner Lock Co.* (supra), is contra to *Rue v. Quinn* (supra), decided six months earlier, then this Court is in error in adopting the *Rue v. Quinn* decision as the law of this State.

**Columbia Screw Co. Case Is the Law of California
and Is Contra to This Court's Decision.**

That the *Columbia Screw Co.* case holds that the affidavit required by Section 412, C. C. P., must be on positive oath, and that an affidavit which is based on hearsay does not give the trial Court jurisdiction to make an order for publication of summons, cannot be questioned.

When the Supreme Court there said:

“When the statute uses the words ‘appears by affidavit’ it means more than an affidavit as to what someone told the party making the affidavit”,

it meant that the facts necessary to give the Court jurisdiction cannot be supplied by an information and belief affidavit.

And when it said:

“In a proceeding against the defendant, without personal notice, it has the right to insist that the statute was not observed in substance”,

and that

“The order, being void, the attempted service by publication is void”,

it was rejecting as a nullity an affidavit based upon information supplied by someone other than the affiant. Finally the Court in that case said that since the trial Court never acquired jurisdiction of the defendant

“*the judgment should not be enforced in any manner.*” (p. 448; emphasis ours.)

These statements of our Supreme Court do not support this Court's statement that:

"it seems evident that in California an affidavit based on information and belief would support an order for publication of the published summons." (p. 4.)

The Cases Relied Upon by This Court in Its Opinion.

We believe that this Court in the present case has been misled by some rather indefinite language in *Rue v. Quinn*, upon which it relies. This Court cites *Rue v. Quinn* (supra) and *Ligare v. California Southern Ry. Co.* (supra), as holding that:

"the hearsay nature of facts stated in an affidavit may be considered by the judge in drawing his conclusion as to due diligence, but that a hearsay affidavit does not automatically render the judgment void." (p. 4.)

We believe we can demonstrate by appropriate quotation from those opinions that they do not so hold.

Ligare v. Calif. So. Ry. Co. Does Not Support the Opinion in This Case.

In *Ligare v. California Southern Ry. Co.* the attack upon the affidavit did not include any reference to the fact that it was based upon hearsay, but was limited to the claim that there was not a showing of sufficient diligence. Furthermore, the affidavit in question recited a search made by the affiant, including an inquiry of

"all persons from whom he could expect to obtain information as to the residence of the defendants." (p. 612.)

The Court finally held that while the showing was not full enough to stand on appeal, it was sufficient to give jurisdiction. (See bottom of p. 613.)

**Rue v. Quinn—Citation Relied Upon
By This Court.**

In *Rue v. Quinn*, 137 Cal. 651, the affidavit, in addition to reciting delivery of summons to the Sheriff and stating what the Sheriff reported back, declares that:

“the *affiant* (to quote from the court’s description of the affidavit) had made due and diligent search and inquiry for the said defendants and each of them for the purpose of serving a summons upon them, by inquiring for each of them of several prominent officers (giving the names of such officers); and further stated, ‘I have also made inquiry of all other persons from whom I could expect to obtain information as to the residence or whereabouts of each of the said defendants, and after such search and inquiry the said defendant cannot be found within the state.’ ”

It must be observed that, besides stating what the Sheriff reported that he had done (which would of course be hearsay) the affiant described what he personally did in the way of a search (which of course was not attackable as hearsay). That is undoubtedly why the Court in that case said that “all of the facts verified were within the knowledge of affiant.” The facts the Court was referring to were the ultimate facts that the plaintiff could not be found after a diligent search. They were in the knowledge of the affiant because he himself made the search.

The Court's reference to hearsay (p. 657) was not as to what the Sheriff said, but as to the information the affiant received from the San Diego residents of whom he made his inquiries. This is clearly evident from the fact that the objection was connected with the contention that the affiant did not inquire of a sufficient number of persons and from the fact that the Court said that

“the evidence thereon must to a very great extent be hearsay.”

The Court in that case certainly was not directing its attention to what the Sheriff reported, because that did not have to be hearsay, for it would have been a simple matter for the plaintiff to have secured an *affidavit* from the Sheriff. On the other hand, the information the affiant received from neighbors, etc., in answer to his inquiries could not, except with great difficulty, be incorporated into direct affidavits. And since the pertinent fact is whether the *affiant* made the search, the comments from neighbors do not detract from the fact that the affiant made a personal search.

This Court, in the present case, at the bottom of page 4 of the opinion, said:

“* * * The Kahn case determined that an affidavit containing hearsay as to the exercise of due diligence was insufficient to uphold an order for publication. It involved a direct appeal from the judgment questioned. It mentioned the fact that an affiant cannot be held responsible for the truthfulness of hearsay statements in an affidavit. The California District Court of Appeal in *Ap-*

plication of Behymer, 130 Cal. App. 200, followed the reasoning of the Kahn case explicitly and on a collateral attack held a prior judgment void. However, in the meantime in *Rue v. Quinn*, supra, the Supreme Court had restricted the effect of the *Kahn* case to circumstances where a direct appeal was taken from the judgment questioned."

The *Kahn* case did not hold that an "affidavit containing hearsay" as to the exercise of due diligence was insufficient to uphold an order for publication. It held that a *hearsay affidavit* is of no force—which the same Court has frequently held since that decision was rendered, and *it disregarded the hearsay part of the affidavit*. But in the affidavit in that case there were direct allegations of what the affiant did personally. He recited that he spoke to the

"two daughters of the defendant, requesting them to allow the said defendant to be served with the said copy of summons and complaint; and that said daughters, and each of them, both being of legal age, refused to allow the defendant herein to be served with said papers, and are using every endeavor in their power to prevent said service." (693.)

After declaring that a hearsay affidavit was valueless, the Court directed itself to the latter part of the affidavit and held that the affidavit was not in sufficient detail—a point which could be raised on appeal, but not on a collateral attack.

Nowhere in *Rue v. Quinn* does the Court say that an affidavit, which as to all material facts relies upon

hearsay, is evidence and gives jurisdiction for an order for publication of summons. Its reference to *Kahn v. Matthai*, 137 Cal. 654 (mentioned in the above quotation from this Court's opinion), is not to the Court's reference in that case to hearsay, but to the fact that in the *Matthai* case the Court had a right to determine whether the affidavit showed in sufficient detail the requisite amount of diligence, which was the point to be determined in *Rue v. Quinn*.

Rue v. Quinn very properly held, we believe, that "there is no difference in principle when it affirmatively appears from the judgment record itself that the court had no jurisdiction of the defendant, whether the attack upon the judgment is direct or collateral. If the judgment is void it is not available in either case." (p. 654.)

And when it held that

"If either of these facts (the exercise of due diligence to find the defendant within the state, and a failure to find him after the exercise of due diligence) *does not appear by affidavit*, the court or judge has no jurisdiction to make the order, and an order made thereon will be insufficient to sustain a judgment based upon such service." (p. 655.)

The decision in *Application of Behymer*, 130 Cal. App. 200, in declaring the order void, did, as this Court commented, follow the decision in *Kahn v. Matthai*, but only that part of the decision which held a hearsay affidavit to be of no effect. Whereas, when the Supreme Court in *Rue v. Quinn*, referred to the holding of *Kahn v. Matthai* as having been a

direct attack in the form of an appeal, it was not addressing itself to the holding of the *Kahn* case decision, that hearsay is not legal evidence, but to the holding in that case that the showing as to diligence was insufficient. In the *Kahn* case there was in the affidavit some evidence of diligence which was free from the hearsay taint. The Court, in *Rue v. Quinn*, did not even insinuate that an order based upon an affidavit which as to every material point was hearsay was not void and could not be attacked collaterally.

Incidentally, the affidavit in the *Behymer* case is almost identical with the affidavit in the case at bar, except that it first alleges the fact of diligent and unsuccessful search and then recites what the search consisted of, whereas Mr. Herrington's affidavit here recites first what was done and then closes with the allegation that there was a diligent and unsuccessful search. In the affidavit in each case the facts referred to are contained in hearsay reports to the affiants of the activity of a Los Angeles process server employed to make the search.

**This Court's Citation—*Forbes v. Hyde*
Is Contra to Its Opinion.**

On page 5 of the opinion this Court states as the rule that

“the California cases support the conclusion that on a direct attack from a judgment, an affidavit based upon hearsay will be found fatally defective and the judgment will be ordered re-

versed. However, on collateral attack or on direct attack after the expiration of the period for appeal the affidavit will be found sufficient and the judgment will not be held void,”

and then cites *Forbes v. Hyde*, 31 Cal. 342, 348, as clearly drawing the comparison, and quotes at some length from the decision in that case.

Forbes v. Hyde, in our opinion, does not support the Court's conclusion. There, *in a collateral attack by strangers to the judgment*, the Court held that where the affidavit of plaintiff for publication stated that

“he has a good cause of action in this suit against defendant and that he is a necessary and proper defendant thereto, as he verily believes”

there was no *legal* evidence for the Court to act upon and that therefore the order for publication and the default judgment taken thereunder were absolutely **VOID**.

So in considering the language quoted from *Forbes v. Hyde* in this Court's opinion one should have in mind that an affidavit based upon the affiant's *belief* was considered by the Court in that case as containing no “*legal evidence*”; and that when the Court referred to “*evidence*” it meant *legal* evidence. This fact is brought home too clearly to permit of any doubt in the following excerpt from the *Forbes v. Hyde* decision which appears later in that decision, that

“* * * *The fact must appear by affidavit before jurisdiction to make the order attaches.* That is to say, there must be an affidavit containing a statement of some fact which would be *legal evidence*, having some appreciable tendency to make the jurisdictional fact appear, for the judge to act upon before he has an jurisdiction to make the order. Unless the affidavit contains some such evidence tending to establish every material jurisdictional fact, the Judge has no legal authority to be satisfied, and, if he makes the order, he acts without jurisdiction, and all proceedings based upon it are void.”

**Herrington's Affidavit in Light of
Forbes v. Hyde.**

The code provision requires an affidavit of certain facts. The presence of those facts in *affidavit form* is necessary to the Court's jurisdiction. A hearsay affidavit is not legal evidence. If the affidavit fails to contain legal evidence the Court acquired no jurisdiction and the order and judgment are void under direct or collateral attack.

The facts which must appear by affidavit to give the Court jurisdiction under Section 412, C. C. P., are

(1) The defendant cannot after due diligence be found within the state, or conceals himself to avoid service;

(2) A cause of action exists against the defendant;

(3) There has not been filed, on behalf of the defendant, a certificate of residence either in the

county in which such action was brought * * * is pending.

(1) Herrington in San Francisco makes an affidavit that someone gave him a Los Angeles address of appellee. How did he know that defendant was not still residing at that address and there amenable to service? Whatever information he had in that regard came from the Marshal or Mr. Gold. The code section does not say proof may be by unverified return of the Sheriff—*it must be by affidavit*. Is the fact that Herrington employed the Sheriff to make service, and then secured the appointment of Gold to make the service, evidence that the defendant could not be found in Los Angeles after a diligent search? Appellants did not think it was sufficient, because after appellee made her motion they sought to correct the situation by seeking leave to file affidavits of the Marshal and Mr. Gold.

(2) *Forbes v. Hyde* (supra) is direct authority for the proposition that alleging the affiant's *belief* that a cause of action existed against the defendant, rendered the order for publication, and the judgment which followed, void under collateral attack.

(3) When affiant Herrington alleged on information and belief that defendant had not filed a certificate of residence in California he was not swearing to the fact, but merely to his belief. Such an affidavit is but hearsay and does not constitute "legal evidence" upon which the Court could take jurisdiction and act.

**Cohen v. Portland Lodge Is Not
California Law.**

In closing its opinion, this Court rejects our argument that a perjury charge cannot be predicated upon a hearsay affidavit, declaring it untenable and citing the Court's opinion in *Cohen v. Portland Lodge of B. P. O. E.*, 152 Fed. 357 (which is a case involving Oregon law and is therefore of little aid in determining the interpretation of a California statute by California Courts) in support of its proposition that:

“in a situation *where no specific information has been imparted to him*, if a man swears that because of such information, a defendant could not with due diligence be found or a defendant was concealing himself to avoid service, he subjects himself to liability for perjury, for he has corruptly made a positive statement.” (p. 6; emphasis ours.)

Naturally if a man swears to having received certain information when he had not received any such information, he has committed perjury, assuming the evidence is material. But if a person recites that he received information from others, which he in fact receives, he of course does not commit perjury, *and yet the information he received might be entirely false.*

If I say that I went to defendant's address in Los Angeles in search of defendant, and could not find him there, I am reciting what I did and if I did not make such a trip, I am stating what is false. But if I hire someone else to go to defendant's address, and the one I hired tells me that *he* went to defendant's

address in search of him and could not find him, and I recite in an affidavit just what my hired man told me and credit him with the statement, I cannot be guilty of false swearing, even though every word my hired man told me were false.

In the present case, every statement which had to do with any effort to serve or locate the defendant appellee, was, according to the information supplied Herrington, made by either the Marshal or Mr. Gold. Consequently Herrington, the signer of the only affidavit before the Court issuing the order for publication of summons, knew none of the facts of his own knowledge—it was as to him mere hearsay. If he had been on the witness stand any testimony offered by him as to any efforts to serve appellee, would have been rejected under the hearsay rule. Where the testimony is offered by way of affidavit, in the absence of the defendant, for the purpose of securing an order for the publication of summons which publication would be seen by the defendant only by the merest accident, it would seem that the hearsay rule should be more rigidly enforced rather than relaxed.

II.

THE OPINION ADOPTS HERRINGTON'S CONCLUSION AS A STATEMENT OF FACT.

The Court in its opinion says that part of the affidavit in this case is free from the hearsay objection. The language used is as follows:

“It alleges that affiant and plaintiff’s attorneys ‘have made a diligent search for said defendant and made inquiries of each and every person whom they could suspect, or had any reason to believe they would receive, information as to the whereabouts of said defendant’ and is in other respects similar to the affidavit held sufficient on collateral attack in *Ligare v. Calif. So. Ry. Co.*, 76 Cal. 610. Furthermore, it refers to the return of the U. S. Marshal and *therefore incorporates positive statements from at least 3 individuals as to their inability to find appellee.*”

It is apparent that this Court was accepting the above quoted language as a recital of a search made by the affiant rather than a conclusion drawn from the search made by process server Gold and the Deputy Marshal.

Affidavit Taken as a Whole Shows Statement Is Conclusion Based Upon Hearsay.

We respectfully submit that the arrangement of the context of the affidavit clearly indicates that reference was being made to the information obtained by the affiant from the letters of Gold and the Deputy Marshal. After using up ten pages of the record in reciting what Gold and the Deputy Marshal had reported to the affiant by letter, the affidavit continues:

“That in view of the foregoing, affiant and plaintiff’s lawyers have decided it would be futile to spend further time, effort and money in an attempt to effect personal service of process on said defendant; that said defendant Grace Appleton McKey cannot, after due diligence, be found

within the State of California, and cannot be personally served with subpoena or other process.” (Emphasis ours.)

Then in the same paragraph affiant makes the statement which is quoted in the opinion. It seems clear to us that the “inquiries” that affiant is referring to are not inquiries made directly by them, but inquiries made through the attorney’s agents, which were reported to the attorneys by letter as related in the earlier part of the affidavit.

Appellants’ Opening Brief Shows Appellants Made No Claim of a Search by the Affiant.

We are not alone in this belief. The trial judge and appellants’ attorneys agree with us. The trial judge, by vacating the decree because the affidavit was hearsay, necessarily must have reached that conclusion. That appellants’ attorneys make no claim that they or Herrington made any independent search to determine respondent’s whereabouts, is clearly evidenced by the following language appearing on page 5 of Appellants’ Opening Brief, under the heading, “Statement of the Case”, viz.:

“Subpoena could not be served upon appellant because the United States Marshal, after diligent search, was unable to find her. After the United States Marshal had returned the subpoena unserved, alias subpoena was issued and upon appellant’s motion Leo K. Gold was appointed to effect service of the alias subpoena upon appellee and other defendants.” (Then is

inserted an excerpt from the order appointing Gold.) “Leo K. Gold was unable to serve process upon appellee. *Thereupon appellant moved for publication of subpoena* upon the grounds that appellee, after due diligence could not be found within the state, etc.”

In other words, upon unsuccessful “searches” by the Marshal and Gold, motion was made for the order of publication,—not even a suggestion that the order was predicated upon any search except those of Gold and the Marshal.

Herrington Could Not Swear of His Own Knowledge as to Essential Facts.

Obviously the purpose of the recital of the contents of Gold’s letter and the Marshal’s report was to establish the fact of due diligence in the search, and the lack of success therein. It is equally obvious, we believe, that if Herrington, from the witness stand, attempted to testify as to what Gold and the Marshal wrote him, the Court would have had to reject such testimony under the hearsay rule. Herrington started with an address for appellee, to-wit, 1550 North Fairfax Ave., Hollywood, California. (Herrington affidavit, R. 47.) Therefore, the search naturally would start from there. Is there any statement in the affidavit that Herrington went to Los Angeles to make the search? Is there anything in the affidavit to show that Herrington had any information that appellee was not at that address, which did not come to him in hearsay form from Gold or the Deputy Marshal?

When the Court says in its opinion, with reference to the affidavit of Herrington, that

“Furthermore, it refers to the return of the United States Marshal and therefore incorporates positive statements from at least three individuals as to their inability to find appellee”,

it was ignoring the words “appears by affidavit”. There are places where the unsworn to return of a Marshal is sufficient to establish the fact therein recited, but where the Code expressly requires an “*affidavit*”, a return of course cannot fill the bill. The only “evidence” before the trial Court when the order was made, as to Gold’s activities, were in quotations from his letters to Herrington, contained in the latter’s affidavit. So his contribution is not under oath.

Employing someone else to make a search does not of itself constitute a diligent search. If defendant McKey was at the 1550 North Fairfax address and a real attempt to serve her would have been successful, there could have been no foundation for publication of summons. Herrington’s affidavit does not reveal that he personally made an effort to serve her and was unable to do so. He merely says that he gave the papers to the Marshal and Gold and they told him they couldn’t serve or find her. So the essential fact, upon which jurisdiction of the trial Court for making the order for publication of summons had to rest, appeared only upon the information and belief of Herrington.

A Witness Can Only Testify as to His Personal Knowledge.

Section 412, *C. C. P.*, says that the fact that the defendant

“cannot after due diligence be found within the State, or conceals himself to avoid service”

must appear by *affidavit*. No other character of proof is provided for.

The Supreme Court in *Rue v. Quinn*, 137 Cal. 651, at 655, relied upon in this Court’s opinion in the present case, declared that if the facts showing due diligence, etc.,

“do not appear by *affidavit*, the Court or Judge has no jurisdiction to make the order, and an order made thereon will be insufficient to sustain a judgment based upon such service.”

Section 1845, *C. C. P.*, reads:

“A witness can testify of those facts only which he knows of his own knowledge; that is, which are derived from his own perceptions, except in those express cases in which his opinions or inferences or the declaration of others, are admissible.”

The California Supreme Court, in *Gay v. Torrance*, 145 Cal. 144, 151, held that an affidavit filed in a motion for new trial based on claimed “irregularities” was of no avail because every *material* statement therein was made upon information received from others; was not competent evidence and was “unavailing for any purpose”. The Court, in passing upon the matter, said (at p. 152):

“* * * where one is testifying as to something that has transpired he can ordinarily testify only as to those facts which he knows of his own knowledge (Code Civ. Proc., sec. 1845), and it is immaterial in this connection whether his testimony is taken by affidavit, deposition, or oral examination.

“Where a statute provides that the evidence upon a certain question must be presented by affidavit it simply means that the competent and material testimony must be presented by the *affidavits of the witnesses*. If the statute authorized the taking of the testimony on a motion for new trial by oral examination, we apprehend that it would not be contended *that Mr. Newby could have given purely hearsay testimony*. * * *” (Emphasis ours.)

III.

THE JUDGMENT IS VOID BECAUSE PLAINTIFFS (APPELLANTS) FAILED TO ESTABLISH BY AFFIDAVIT, THAT NO CERTIFICATE OF RESIDENCE WAS FILED BY DEFENDANT (APPELLEE) IN SAN FRANCISCO.

The Code Sections.

Section 412 of the California Code of Civil Procedure provides that:

“Where service is sought to be made upon a person by publication upon the ground that he cannot after due diligence be found within the state, *it must first appear by the affidavit aforesaid* that there has not been filed, on behalf of such person, either in the county in which such action was brought, or in the county in which such

action is pending, the certificate of residence provided for by Section 1163 of the Civil Code.” (Emphasis, of course, ours.)

Section 1163 of the Civil Code provides for recording in the office of the County Recorder of a certificate by a person or corporation designating the place where service might be made on such person or corporation.

Herrington's Affidavit Is Insufficient to Give Jurisdiction.

The only reference in the affidavit to the absence of the certificate referred to in Section 412, quoted above, is the following:

“That affiant is *informed and believes and therefore alleges the fact to be that* there has not been filed by said defendant or on her behalf, in the City and County of San Francisco, State of California, where said action was brought and is pending, a certificate of residence as provided by Section 1163 of the Civil Code of California.”

At the oral argument we called to the Court's attention the fact that the above quoted portion of Herrington's affidavit failed to meet the requirement of the Code section.

The mandatory “must” of the Code section means just that. It was so held in *McPhail v. Nunes*, 38 Cal. App. 557, 560, in which case the affidavit for publication made no reference to the absence of the certificate discussed in Section 1163 (*supra*).

Court: “It cannot for a moment be doubted that, to have legally authorized the court to make

the order for the publication of the summons, if was *absolutely necessary* that the affidavit should have contained the statement either that no certificate designating the place where the summons might be served on the defendant, Copper, in said action, had been filed, or that, if filed, the defendant could not be found by the sheriff at the place designated in the certificate where summons might be served. The failure to do so rendered the affidavit fatally defective. In other words, by reason of the failure to incorporate that statement in the affidavit, section 412 of the Code of Civil Procedure was not only not substantially complied with, but legally the same as not complied with at all." (Emphasis ours.)

The Court in the *McPhail* case goes on to state that the trial Court has no power to make the order for publication, unless the affidavit recites the absence of the certificate of residence provided for by Section 1163 of the Civil Code; and then disposes of the contention that the point could not be raised collaterally, by saying:

"The affidavit for publication of summons and the order directing publication of the same are part of the judgment-roll, where the service of summons is constructive or by publication. It is, of course, well settled that where the judgment is void upon its face it may be attacked collaterally. In other words, if an inspection of the judgment-roll itself discloses that the judgment is for any reason void, the judgment may be so declared and as having no force or effect *on a collateral as well as on a direct attack thereon.*" (562) (Emphasis ours.)

We said in the oral argument that it was elementary that the contents of a public record or the absence thereof could not be pleaded on information and belief, because the fact is available to the pleader. The books are spotted with cases so holding. In *Home Owner's Loan Corporation v. Gordon*, 36 Cal. App. (2d) 189, the defendant, in answering the complaint, alleged *upon information and belief* that the plaintiff had not complied with the section of the Civil Code which provides that a foreign corporation, before it can sue in California Courts, must register in California. The Appellate Court held that such an allegation was of no effect, saying:

“This violates the rule of pleading, which requires that matters of record must be alleged positively and not upon information and belief. This rule is particularly applicable to a pleading in abatement which, being dilatory in its nature, is to be strictly construed.” (192)

(It will be recalled from the authorities cited in the briefs, that Section 412, *C. C. P.*, is to be strictly construed because of the possibility that judgment might be had without defendant's knowledge.) And the Supreme Court of California in *Art Metal Constr. Co. v. Anderson*, 182 Cal. 29, stated the same rule in the following language:

“It is well settled in this state that when the existence of an alleged fact may be ascertained from an inspection of a public record, its existence cannot be put in issue by a denial based solely upon information and belief.” (Citing cases.) (33)

To the same effect, see *Lincoln County Bk. v. Geo. C. Fetterman*, 170 Cal. 357.

Appellant may say we have not claimed that any certificate was filed. The answer to this is that we are not obligated to meet a *void* judgment. On the contrary, the defendant under a void judgment can either sit by and rely upon its invalidity (if she knows of its existence) or can set up its invalidity at any time.

There is no hardship on appellants under the rule, because they started with an outlawed claim, and if they had seriously considered collecting a judgment for \$110,000.00, they would have been more careful in the preparation of a record which they knew might not reach the eye of the defendant until after a judgment therein was entered.

A void judgment is attackable any time, any place. It is a nullity. (See Appellee's Brief, pp. 17-25, and *Harris v. Hardemann*, 14 How. 334.)

Appellants cannot avoid this plain jurisdictional defect by contending that somewhere else in the affidavit the affiant covered the point by positive testimony, because the hereinabove quoted piece of hearsay taken from the affidavit is the only reference in the entire affidavit that even relates to the question of the presence or lack of a recorded certificate of residence.

CONCLUSION.

We have given no consideration to the Court's discussion of the Federal authorities applying the rule in other states, for the reason that under the rule California law applies and the California Legislature and the California Courts have spoken definitely upon the subject.

In closing appellee respectfully request a rehearing by this Court of the jurisdictional points referred to in this petition, to the end that the decision heretofore rendered be recalled and the trial Court's order in setting aside the default judgment taken against appellee be affirmed.

Dated, San Francisco,
October 8, 1943.

SULLIVAN, ROCHE, JOHNSON
& FARRAHER,
THEO. J. ROCHE,
HIRAM W. JOHNSON,
THEODORE H. ROCHE,
GEORGE A. STOCKFLETH,
JAMES FARRAHER,

*Attorneys for Appellee
and Petitioner.*

CERTIFICATE OF COUNSEL.

The undersigned, James Farraher, one of the attorneys for appellee and petitioner in the said cause and proceeding, hereby certifies that in his judgment the foregoing petition is well founded and that it is not interposed for delay.

Dated, San Francisco,
October 8, 1943.

JAMES FARRAHER,
*Of Counsel for Appellee
and Petitioner.*

No. 10,381

IN THE

**United States Circuit Court of Appeals
For the Ninth Circuit**

JAMES W. BUTLER, et al.,

Appellants,

vs.

GRACE APPLETON McKEY,

Appellee.

**APPELLANTS' REPLY TO
APPELLEE'S PETITION FOR A REHEARING.**

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FILED

OCT 20 1943

**PAUL P. O'BRIEN,
CLERK**

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No. 10,381

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES W. BUTLER, et al.,

Appellants,

vs.

GRACE APPLETON McKEY,

Appellee.

APPELLANTS' REPLY TO

APPELLEE'S PETITION FOR A REHEARING.

*To the Honorable Curtis D. Wilbur, Presiding Judge,
and to the Associate Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:*

I.

**THIS COURT DID NOT HOLD THAT CALIFORNIA LAW RATHER
THAN FEDERAL LAW GOVERNS THE QUESTION WHETHER
DEFECTS IN THE MODE OF PROOF RELATING TO THE
PUBLICATION OF SUMMONS RENDER A FEDERAL JUDG-
MENT VOID.**

(1) This Court cited Rule 4 (d) (7) of the Federal Rules of Civil Procedure as applicable to the manner in which service upon an individual can be accomplished. There is no federal statute relating to service by publication so that in this case the man-

ner of service was governed by the California statute, to-wit: Section 412 of the California Code of Civil Procedure.

(2) Where a plaintiff's affidavit for publication of service is in any manner defective, the question still remains whether the judgment based on such service is a "nullity" or whether it is good as against collateral attack.

This Court's opinion does not expressly refer to the doctrine that the nullity of a federal judgment is a federal question which is governed by federal law and precedents.

Bronson v. Schulten, 104 U. S. 410, 26 L. ed. 797;

United States v. Mayer, 235 U. S. 55, 69, 59 L. ed. 129, 136;

Note 182 in 28 U. S. C. A., Sec. 724, which authorities are quoted and discussed in appellants' opening brief on pages 13 and 14 and in appellants' reply brief on page 4.

The obvious reason why the Court did not discuss the above doctrine is that the California precedents and the federal precedents are to the same effect, to-wit: That under both lines of precedents, state as well as federal, hearsay contained in an affidavit for publication of service does not make the judgment a nullity and open to collateral attack.

The Court's opinion (after discussing the California cases on the power of the Courts to vacate judgments upon collateral attack) refers to the federal authorities, to-wit:

(a) *Thompson v. Thompson*, 226 U. S. 551, 556, 57 L. ed. 347, involving a situation closely analogous in which the U. S. Supreme Court upheld a judgment based on publication of service *where the affidavit was made wholly on information and belief*, and the Court said that even if the Virginia law would not sanction such affidavit the judgment would not be a nullity where *the affidavit was defective "not in omitting to state a material fact, but in the mode of stating it or in the degree of proof"*. (Italics ours.)

(b) *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565, where the U. S. Supreme Court disagreed with the trial Court because the trial Court had said that an affidavit for publication of service which was defective in the mode of proof made the judgment void on its face. The wording of the affidavit in the case of *Pennoyer v. Neff*, *supra*, is quoted on pages 21 and 22 of appellants' opening brief.

The significance of the holding of the U. S. Supreme Court in *Thompson v. Thompson*, *supra*, is well illustrated by the following cases cited by the U. S. Supreme Court in the *Thompson* case:

Belmont v. Cornen, 82 N. Y. 256;

Pettiford v. Zoellner, 45 Mich. 358, 362, 8 N. W. 57.

(c) *Marx v. Ebner*, 180 U. S. 314, where the U. S. Supreme Court looked to the proof furnished by the marshal's return as well as to plaintiff's affidavit under a statute practically identical with the California statute.

(d) Appellee's argument that a perjury charge could not be sustained against affiant was refuted and discussed in this Court's decision in the case of *Cohen v. Portland Lodge, No. 142, B. P. O. E.* (C. C. A. 9), 152 Fed. 357, which is likewise cited in the opinion.

(3) The petitioner in his petition for a rehearing does not even mention the foregoing three decisions of the United States Supreme Court set forth in the opinion of this Court.

Upon search of petitioner's brief in support of his petition we find only two short remarks therein relating to, though by no means explaining or justifying, this remarkable neglect.

On page 3 of her brief, petitioner says:

"We believe that the opinion of this court is plainly in error in the following particular:

(1) After determining *that the law of this state as to publication of summons governs*, it adopts as the law applicable with reference to the hearsay affidavit, upon which the order for publication of summons was predicated, two decisions of the Supreme Court of California. * * *" (Italics ours.)

On page 27 of her brief, at the outset of her "conclusion" petitioner states:

"We have given no consideration to the court's discussion of the Federal authorities applying the rule in other states, for the reason that *under the rule California law applies* and the California legislature and the California courts have spoken definitely upon the subject." (Italics ours.)

Petitioner does not make it clear which rule is referred to where she says that "under the rule" California law applies. On page 3 of her brief she correctly states that the Court determined that California law governs "as to publication of summons".

Although this Court discussed at length federal authorities, it evidently did not occur to the petitioner that the Court did so because it relied upon such federal precedents to justify its decision. The reasons are evident, to-wit:

(a) That the law, directing how service shall be made is not identical with the law concerning the validity of judgments;

(b) That in this case the attack was directed against a federal judgment the validity of which depends on federal law and precedents, even though the mode of service by publication was governed by local law;

(c) That defects of an affidavit for publication of service concerning the mode of proof rather than the statement of facts necessary for publication of service are not considered as sufficient by the United States Supreme Court to render a judgment void upon collateral attack;

(d) That the marshal's certificate was considered by the United States Supreme Court in a case concerning an identical statute, as proof supporting the judgment.

Petitioner's failure to cite or include in her argument the three U. S. Supreme Court decisions relied

on by this Court, speaks for itself. Her silence concerning these federal authorities cited in this Court's opinion demonstrates *that she recognizes the soundness of the Court's reasoning in that the judgment cannot be vacated upon her collateral attack if federal precedents are applicable to the question whether this federal judgment is a nullity.*

II.

THE LAW OF CALIFORNIA IS TO THE SAME EFFECT AS THE FEDERAL PRECEDENTS, TO WIT, THAT DEFECTS IN AN AFFIDAVIT FOR PUBLICATION OF SERVICE AS TO THE MODE OF PROOF DO NOT MAKE THE JUDGMENT BASED ON SUCH SERVICE VOID AND OPEN TO COLLATERAL ATTACK.

This Court, after having referred in its opinion to Section 412 of the California Code of Civil Procedure, discusses the question what effect the California decisions have given to hearsay statements in an affidavit in support of an order for publication of summons. If the California law has been construed by the California authorities that either an affidavit containing hearsay statements is good as against direct attack upon the judgment or that it is good as against collateral attack upon the judgment, it must be said that the service is not even defective under the local law and that therefore the second question is not decisive to-wit; that where the proof for publication of service is defective under the local law, such defect does not render the judgment void under federal authorities.

In discussing the California law, this Court makes a clear and definite distinction between the direct attack upon a judgment and collateral attack stating that a motion to vacate a judgment made after the expiration of the statutory period is a collateral attack in California under the authority of the case of *City of Salinas v. Luke Kow Lee*, 217 Cal. 252 at page 255, and the other cases cited in that decision.

This Court cites one of the several California cases, *Forbes v. Hyde*, 31 Cal. 342, 348, which clearly draw the marked distinction between the examination of an affidavit upon direct attack as distinguished from a collateral attack, and then refers also to the case of *Ligare v. California Southern Railroad Co.*, 76 Cal. 610 at page 613, where the ruling in *Forbes v. Hyde*, *supra*, was expressly followed.

Petitioner criticizes the reference made by this Court to *Forbes v. Hyde*, *supra*. This criticism (on pages 11, et seq. of her brief) is exclusively devoted to the facts of *Forbes v. Hyde*, and expresses petitioner's opinion on the question whether the Court in the case of *Forbes v. Hyde*, *supra*, had before it an affidavit which was better legal evidence than Herrington's affidavit. However, *Forbes v. Hyde* was merely cited by this Court as representative of the legal principle that the California Courts draw a vital distinction between the examination of the proof submitted for service by publication upon a collateral attack as compared to the examination of such proof upon direct attack. It would therefore be completely idle to follow petitioner's argument on the facts of

Forbes v. Hyde. Petitioner entirely overlooks the fact that the California Courts have restated the same principle in the case of *City of Salinas v. Luke Kow Lee*, supra, at pages 255 and 256, and *Kaufmann v. California Mining, etc. Syndicate*, 16 Cal. (2d) 90 at pages 92 and 93, and that the rule in California that the recitals in a judgment as to due service are binding upon collateral attack (see *City of Salinas*, supra, at page 256 and the *Kaufmann* case at page 93) is identical with the rule that hearsay statements in an affidavit are not fatal to the judgment upon collateral attack. (See our citations from California cases on pages 31, et seq. of appellants' opening brief, and 26 et seq. of appellants' reply brief.) We particularly refer to the discussion of the case of *Ligare v. California S. R. R. Co.*, supra, on page 36 of our opening brief wherein we have shown that Herrington's affidavit would under all circumstances have been upheld by the California Court upon collateral attack.

This Court in emphasizing the distinction made under California law between the examination of the proof for publication of service upon direct attack on the one hand and collateral attack on the other hand refers to the difference in the requirements as to hearsay in the case of *Kahn v. Matthai*, 115 Cal. 689 as compared with the case of *Rue v. Quinn*, 137 Cal. 651.

In the *Rue* case the Court expressly distinguished *Kahn v. Matthai*, supra, on the ground that the *Kahn* case contained a ruling upon direct attack.

Petitioner thinks that this Court was in error in adopting the *Rue v. Quinn* decision as the California law, because this Court in its opinion mentions that "perhaps", in the case of *Columbia Screw Company v. Warner Lock Co.*, 138 Cal. 445, the California Court applied the same standards of examination as in the *Kahn* case, so that since *Rue v. Quinn*, supra, was decided six months prior to the *Columbia Screw Company* case the holding in *Rue v. Quinn*, supra, was overruled by the California Court. There is a fundamental error involved in petitioner's reasoning which is revealed by referring to the fact that the *Columbia Screw Co.* case was a case of direct attack on a judgment. The opinion in that case commences with the following sentence: "This appeal is from a default judgment". We would have much to say with regard to this case, if it would be at all within the scope of our present inquiry which is only concerned with collateral attack on a judgment. As the *Columbia Screw Co.* case did not relate to the law laid down in the case of *Rue v. Quinn*, supra, we follow this Court's line of reasoning that it is beyond the issues of this case whether the *Columbia Screw* case is comparable to the ruling in *Kahn v. Matthai* or not.

That the rule in *Rue v. Quinn* has never been overruled in California is clearly witnessed by the cases of *City of Salinas v. Luke Kow Lee*, supra, at page 256, and *Kaufmann v. California Mining Syndicate*, supra, at page 91, where the Court in the case of a collateral attack said (August, 1940):

“The ordinary rules governing a direct attack upon a judgment have no bearing under the circumstances. (*Musser v. Fitting*, 26 Cal. page 746; *Rue v. Quinn*, 137 Cal. 651.)”

Part of petitioner’s brief is devoted to a discussion of her theory on the ruling in *Rue v. Quinn*, which is expressed on page 11 of petitioner’s brief as follows:

“The Court, in *Rue v. Quinn*, did not even insinuate that an order based upon an affidavit which as to every material point was hearsay was not void and could not be attacked collaterally.”

The Court said in *Rue v. Quinn*, at page 657:

“The objections that the facts stated in the affidavit are only hearsay, and that the inquiries of the affiant were limited to persons in the county of San Diego, were proper to be considered by the judge when an application for the order was made, for the purpose of determining whether sufficient diligence had been employed to ascertain if the defendant could be found within the state; but these facts do not justify a disregard of his conclusion or render his order void.”

We believe that this citation where the Court proceeds under the assumption of an affidavit where the facts stated “are only hearsay” should make it entirely clear that petitioner’s theory on *Rue v. Quinn*, is not supported by the case. We also refer to the fact that the California doctrine on the binding force of the recital of due service in the judgment upon

collateral attack necessarily covers hearsay features in the proof for publication of service. (*City of Salinas v. Lee*, supra, at page 256; *Kaufmann v. California Mining Syndicate*, supra, at page 93, and *Hahn v. Kelly*, 34 Cal. 391, 431, which case was followed and quoted in the *Kaufmann* case.)

In referring to *Cohn v. Portland Lodge*, supra, this Court met petitioner's argument that a perjury charge could not have been predicated on Herrington's affidavit. It is therefore immaterial whether this Court's decision in *Cohn v. Portland Lodge*, supra, referred to the California law or to the identical Oregon law since the same argument could be made under both laws and be answered by the same reasons which are set forth in the case of *Cohn v. Portland Lodge*, supra.

III.

THIS COURT FINDS THAT HERRINGTON'S AFFIDAVIT WAS NOT ENTIRELY FOUNDED UPON HEARSAY AND THAT THE MARSHAL'S RETURN WAS REFERRED TO IN THE AFFIDAVIT AND INCORPORATED IN THE SAME AND THAT THE MARSHAL'S CERTIFICATE WAS ALSO BEFORE THE COURT AND CARRIED WEIGHT AS EVIDENCE.

California and federal precedents alike are to the effect that the marshal's return can be referred to in an affidavit and made a part thereof and that the marshal's certificate is admissible evidence for an order of publication of service. The Federal and California authorities cited on page 22 of our reply brief are passed over in silence by petitioner.

Herrington's statement that he and the other attorneys for appellants made diligent search for the defendant and made inquiries of each and every person whom they could expect to be able to give information as to the whereabouts of said defendant and that he and the other attorneys did not know the present whereabouts of the defendant and could not learn her present whereabouts was certainly not subject to criticism as hearsay and is referred to in the Court's opinion as being not subject to petitioner's objections against hearsay statements.

That this statement was independent and not part of Herrington's statements on Leo K. Gold's reports is discussed on pages 38 et seq. of appellants' reply brief. We also refer to Herrington's statement in his affidavit on the inquiries which he made of a law firm in Los Angeles. (Tr. pp. 55 and 56.)

Petitioner claims that the trial judge and appellants' attorneys agree with her in her interpretation of Herrington's affidavit. (Petitioner's Brief p. 18.)

The trial judge rendered his decision without opinion so that his reasons are unknown. He may even have relied on one of the grounds of attack which petitioner later dropped.

Where petitioner claims that the undersigned attorneys have placed the same interpretation on Herrington's affidavit that she does, she misreads the passage quoted on page 18 of her brief. This passage is contained in the statement of the case on page 5 of our opening brief and is concerned with the fact that two attempts to serve process were made. The

first by the United States Marshal, and the second by Leo K. Gold, who had been appointed process server by the Court. It is stated that first the United States Marshal after diligent search was unable to find defendant and returned the subpoena unserved, and that then Gold was appointed, and that he was "also unable to serve process upon appellee". The word "thereupon" following this sentence shows that appellee did not move for publication of summons until not only the marshal but also Gold had failed to serve process.

The whole statement cited by petitioner is not concerned with the question what kind of search was made in order to locate defendant; the fact was merely stated that Gold's attempt to serve process had failed. Herrington's inquiries were therefore not a matter within the scope of that statement.

IV.

THE JUDGMENT IS NOT VOID FOR THE REASONS CONTENTED BY PETITIONER THAT APPELLANTS FAILED TO ESTABLISH BY AFFIDAVIT THAT NO CERTIFICATE OF RESIDENCE WAS FILED BY APPELLEE IN SAN FRANCISCO.

Herrington states in his affidavit upon information and belief that no certificate of residence had been filed by defendant (appellee) or on her behalf in the City and County of San Francisco.

(1) We have searched petitioner's brief in order to find the material allegation that such certificate had been filed. Petitioner in her motion to vacate the

judgment never made such an allegation and nor does she now make any allegation to that effect. In other words, the fact is that no such certificate was filed and that Herrington's affidavit that such certificate was not filed was absolutely correct.

The Courts, Federal and California Courts alike, have made it clear that the first concern of the Court with a motion to vacate a judgment is to determine whether the facts necessary for a publication of judgment were present—if those facts were present and only the proof thereof is by any means defective, the Courts have deemed this latter fact immaterial upon collateral attack.

See *Thompson v. Thompson*, supra and the cases cited therein.

So far as California cases are concerned, the Court established the same principle in *Herman v. Santee*, 103 Cal. 519, and reiterated the same in the cases of *City of Salinas v. Luke Kow Lee*, supra, and *Kaufmann v. Mining Syndicate*, supra.

In *Herman v. Santee*, supra, at page 523 the Court quoting *In re Newman*, 75 Cal. 220 said:

“It is the fact of service which gives the court jurisdiction, not the proof of service * * *” (after referring to an amended affidavit):

“None of the facts stated in the affidavit are controverted, and it must be held, therefore, that from the time of the service the court acquired jurisdiction of the parties to the action.”

We also cite from *City of Salinas v. Luke Kow Lee*, supra at page 254 referring to an amended affidavit

of publication citing the right facts and correcting the incorrect statements in the original affidavit:

“It was well within the province of the court below to permit the filing of such amended affidavit of publication * * * for it is now well settled, that it is the fact of service and not the proof of service which determines the validity or invalidity of a judgment.”

(2) In the instant case publication of service was granted on two independent grounds, to-wit, that defendant (appellee) after due diligence could not be found within the state and for the distinct and separate ground that the defendant (appellee) was concealing herself to avoid service of summons. (Tr. p. 60.)

As to the second ground Section 412 of the California Code of Civil Procedure clearly does not require the affidavit to state that a certificate of residence had not been filed. (*Davis v. Ramont*, 66 Cal. App. 778, 781; *City of Salinas v. Luke Kow Lee*, supra at p. 257, expressly distinguishing *McPhail v. Nunes*, 38 Cal. App. 557, the case cited by petitioner.)

(3) Turning to *McPhail v. Nunes*, 38 Cal. App. 557, the sole authority relied on by the petitioner, we find the facts underlying that case to be that service by publication was obtained on the ground that defendant after due diligence could not be found within the state and that in the affidavit for publication of service there was no statement of any character as to whether a certificate of residence had been filed. In

the *McPhail* case, the judgment was attacked upon two grounds:

(a) That the affidavit for publication of service was fatally defective because the facts stated therein were mere ultimate facts alleged solely upon information and belief.

(b) That the affidavit entirely omitted to state facts with respect to the filing of a certificate of residence.

The Court held that for the second reason to wit: the plaintiff's failure to make any statement concerning the filing of a certificate of residence, the judgment was subject to reversal upon defendant's appeal. There is no word contained in the decision that a statement on information and belief in the affidavit concerning the filing of a certificate of residence would have been insufficient to support the judgment.

(4) Petitioner fails to set forth any authority or reason why a hearsay statement in an affidavit of this type concerning the filing of a certificate of residence should have other effect upon the judgment upon collateral attack than another hearsay feature in the same affidavit.

(5) We submit, that the fact that a certificate of residence had *not* been filed, as distinguished from the opposite fact, can obviously only be stated upon information and belief of the affiant. No sensible affiant can state this negative fact affirmatively. The mere fact that upon searching the records or requesting information from the keeper of the record a certificate

of residence did not appear to be filed, does not entitle the affiant to affirmatively state the negative that such certificate, has not been filed. There is always the possibility that it was mislaid or misfiled so that affiant's statement must be limited to his conclusion upon information and belief.

The doctrine on the proof of negative facts in California was expressed in the case of

Russell v. McDowell, 83 Cal. 70, 81,

as follows:

“Moreover, it is to be considered that the contestant was assuming the difficult task of proving a negative * * * and the doctrine is well established that slight proofs make out a prima facie case where a negative is to be proved.”

See also *Hamilton v. Pacific Electric Railway Co.*, 12 Cal. (2d) 598, 603, expressly following the *Russell* case.

Petitioner cites the familiar doctrine that when the existence of an alleged fact (for instance that a foreign corporation is duly authorized to transact business in the state) can be ascertained from an inspection of a public record its existence shall not be put in issue by a denial based solely upon information and belief. (*Art Metal Constr. Co. v. Anderson*, 182 Cal. 29, *Home Owner's Loan Corporation v. Gordon*, 36 Cal. App. (2d) 189.) This doctrine is concerned with a fact which exists outside of the record and for which proof can be found in a record. In the instant case we are concerned with the status of the record itself and not with any fact outside of the record. The

sole matter to be stated is whether or not a certificate of residence has been made part of the record so that the statement upon information and belief can only relate to the record itself. In other words, the requirement that the statement should refer to the public record is complied with by Herrington's statement dealing with the filing or non-filing of a document. Clearly, the question how to prove the negative that a certificate was not filed presents an independent and different problem as to which it must be concluded that the necessary leniency of the Courts with regard to the proof of negatives relates to the proof of a negative concerning a public record as well as to all other types of negatives.

(6) It is hardly necessary to add that petitioner is estopped from amending her motion by now urging a new ground for the alleged nullity of the judgment since appellants cannot now amend their proof as to the fact that a certificate of residence was never filed. It would be an easy way to overcome the right of the plaintiffs (appellants) to amend their proof (discussed on pages 25 et seq. of appellants' opening brief and on pages 45 et seq. of their reply brief) if defendant (appellee) was privileged in spite of the prejudice to the appellants arising therefrom to now urge new points which she had neglected to urge at any prior stage of the matter.

V.

THE PETITIONER DOES NOT ATTACK THE JUDGMENT IN SO FAR AS THE PUBLICATION OF SERVICE WAS BASED ON THE FACT THAT THE PETITIONER WAS CONCEALING HERSELF TO AVOID SERVICE.

We refer to pages 48, et seq. of appellants' reply brief, where we demonstrated that the District Court's exercise of its discretion that Herrington's affidavit proved that appellee concealed herself to avoid service, cannot be disturbed.

VI.

THE MARSHAL'S CERTIFICATE IS ADMISSIBLE EVIDENCE FOR AN ORDER OF PUBLICATION OF SERVICE.

There was no particular reason for the Court to enter into a discussion of the California practice on this point beyond its reference to the federal cases of *Marx v. Ebner*, supra, and to its own decision in the case of *Cohen v. Portland Lodge*, supra.

California authorities which are to the same effect are collected on page 24, et seq. of appellants' reply brief.

VII.

THIS COURT'S OPINION IS NOT CONCERNED WITH A COMPREHENSIVE COLLECTION OF ALL REASONS WHY APPELLEE'S COLLATERAL ATTACK ON THE JUDGMENT MUST FAIL NOR WITH AN EXHAUSTING ENUMERATION OF ALL CALIFORNIA AUTHORITIES.

It is obvious that this Court to justify its decision relied on a few leading principles which were entirely

sufficient to sustain its ruling and that upon entering the subject of California law this Court determined the principles applicable and cited representative decisions bringing out most clearly these principles. However, petitioner labors under a wrong assumption in assuming that the nullity of the judgment can be shown by discussion of factual elements contained in the one or the other of the authorities cited by the Court. This Court, evidently, chose the California decisions which it cited for the language which expressed the legal principles to which this Court looked in reaching its decision.

CONCLUSION.

We submit that petitioner has failed to show any reasons why a rehearing should be granted and therefore her petition should be denied.

Dated, San Francisco,
October 18, 1943.

Respectfully submitted,
DINKELSPIEL & DINKELSPIEL,
Attorneys for Appellants.

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No. 10,381

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

JAMES W. BUTLER, et al.,

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VS.

GRACE APPLETON McKEY,

Appellee.

REPLY BRIEF FOR APPELLANTS.

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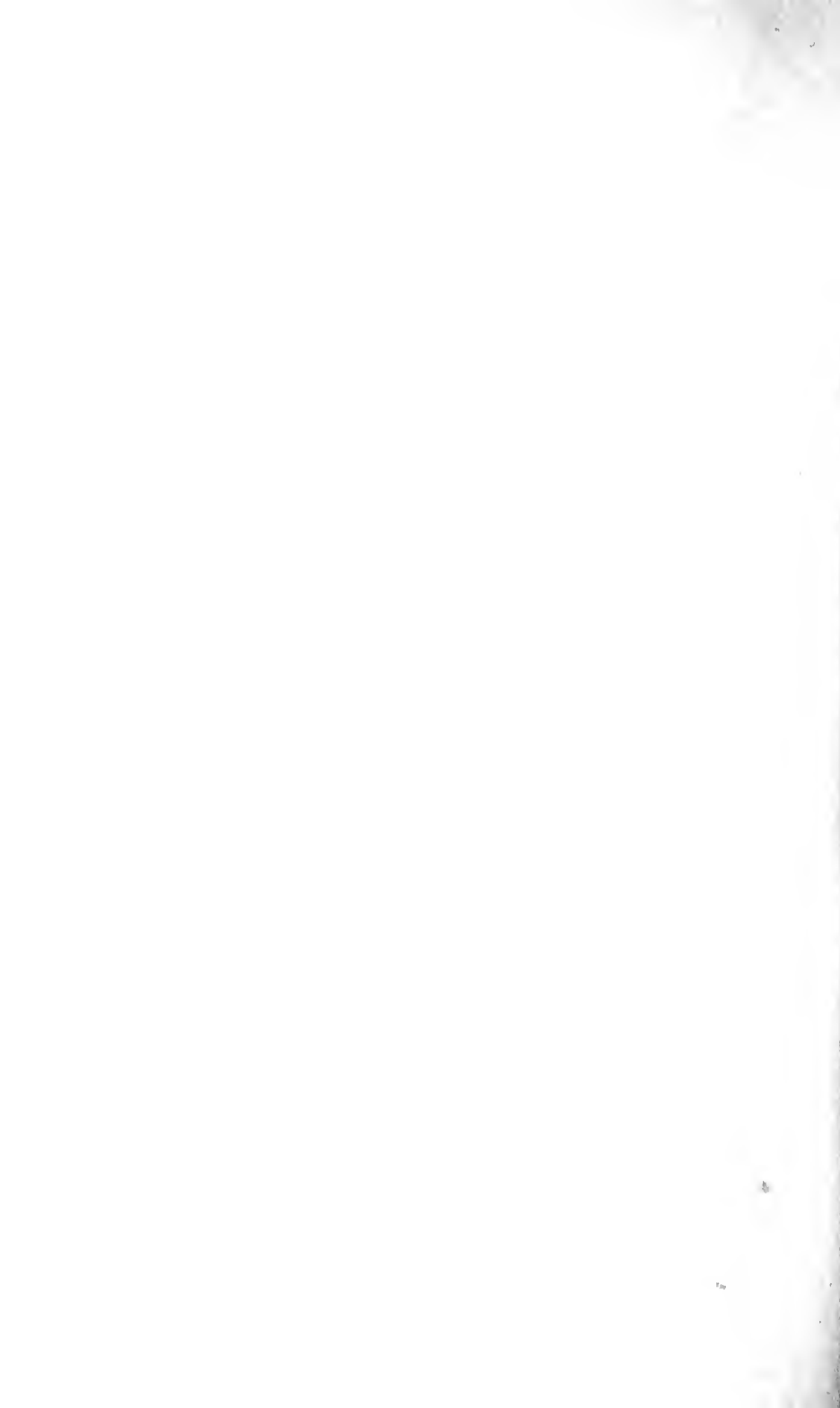
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No. 10,381

IN THE

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JAMES W. BUTLER, et al.,

Appellants,

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Appellee.

REPLY BRIEF FOR APPELLANTS.

I.

ISSUES INVOLVED.

The issues involved in this case are considerably curtailed by appellee's waiver of all attacks on the default judgment of the District Court (Appellee's Brief p. 52) except her attack based on the alleged insufficiency of Herrington's affidavit for the order of publication of summons. Furthermore, our argument that her motion was made after the time provided by the Rules of Civil Procedure (55(c) and 60(b)) and was not a motion to vacate the judgment was answered by appellee as follows (p. 3 of her brief):

“An adequate answer to appellant's argument is that the judgment being a void one, the court

had power to set it aside on its own motion without any intervention by appellee.”

Appellee in this connection refers to the authorities cited on pages 22 to 24 of her brief, all of which ante-date the Rules of Civil Procedure and are to the effect that a judgment void on its face can be vacated after the term of Court.

One further issue to be discussed here is whether or not appellee consented to the jurisdiction of the Court over her person by raising in her motion the point of the statute of limitations which has to do with the merits rather than an attack on the sufficiency of the judgment and by raising the question of the jurisdiction of the Court over the subject matter in litigation.

Whether the judgment is or is not a nullity is the sole issue of law before this Court.

II.

CAN A MOTION CORRESPONDING TO THE FORMER WRITS OF CORAM VOBIS AND CORAM NOBIS BE MADE AT ANY TIME AFTER THE CLOSE OF THE SIX MONTHS' PERIOD FIXED BY RULES 55(c) AND 60(b) OF THE RULES OF CIVIL PROCEDURE?

In our opening brief we were concerned with the question whether appellee after expiration of the six months' period prescribed by Rules 55(c) and 60(b) of the Rules of Civil Procedure, could collaterally attack the judgment on the grounds indicated in her motion. We therefore refrained from discussing

whether a motion in the nature of the former writs of *coram vobis* and *coram nobis* could be made more than six months after entry of judgment. (Our Opening Brief p. 16.) Appellee now by claiming that the judgment is a nullity necessarily refers to her own motion as a motion in the nature of the former writs of *coram vobis* and *coram nobis* which were availed of in the case of judgments which were entirely void.

The Rules of Civil Procedure expressly reserve, in Rule 60(b), the right of a defendant to bring an independent action in equity after the expiration of the six months' period provided in the above rule. There is no provision granting the right to urge the nullity of a judgment by motion after the six months' period. It is therefore an open question whether under the Rules of Civil Procedure a defendant can claim nullity of the judgment by making a motion after expiration of the six months' period therein prescribed.

However, this question differs in nature from the one which we discussed in our opening brief with respect to defective judgments which are not entirely void. A federal judgment which is based on a defective affidavit for publication is not a nullity under federal precedents. Appellee has not been able to cite any federal authority declaring such judgment a nullity, and a motion in the nature of the former writs of *coram vobis* and *coram nobis* is not applicable to this judgment. It would therefore be academic to discuss in this case the question whether a federal judgment which is a nullity can or cannot be attacked by motion beyond the time limit prescribed in Rules 55(c) and 60(b).

III.

THE QUESTION WHETHER A FEDERAL JUDGMENT IS A NULLITY IS GOVERNED BY FEDERAL LAW AND PRECEDENTS.

It is elementary that service of process is governed by local law except where the Rules of Civil Procedure or other federal law prescribes the mode of service. On the other hand, the question of whether a judgment is a nullity because of defects connected with the service of process, or any other reasons is, in the case of a federal judgment, governed by federal law.

Bronson v. Schulten, 104 U. S. 410, 26 L. ed. 797;

United States v. Mayer, 235 U. S. 55, 69, 59 L. ed. 129, 136;

Note 182 in 28 U. S. C. A., Sec. 724 (referred to on p. 14 of our opening brief).

We are by no means concerned with the facts in the cases of *Bronson v. Schulten*, supra, and *United States v. Mayer*, supra. We are interested only in the principle enunciated by the United States Supreme Court in those cases which is clearly to the effect that the question whether there exists in a federal Court "the authority to set aside, *vacate* and modify its final judgments after the term at which they were rendered * * * can neither be conferred upon nor withheld from the courts of the United States by the statutes of a state or the practice of its courts." (Italics ours.) This language of the opinion in the leading case of *Bronson v. Schulten*, supra, was adopted verbatim in *United States v. Mayer*, supra.

It clearly states that a judgment of a federal Court can be vacated only according to federal law and precedent.

We will now discuss the federal authorities which are to the effect that defects in an affidavit for the publication of summons concerning the mode of proof, do not suffice to make a judgment *coram non judice*.

In our opening brief (pp. 20-24) we referred to *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565, and *Thompson v. Thompson*, 226 U. S. 551, 57 L. ed. 347, in both of which cases it was held that defects in an affidavit for an order of publication of summons under the rules of the state law concerning the requirements of proof for publication of service, do not make a judgment rendered upon such service *coram non judice* and subject to collateral attack.

We by no means are admitting that Herrington's affidavit was defective according to California law and we will discuss this point separately hereafter (pages 31 to 45 of this brief). However, assuming for the purposes of this argument that Herrington's affidavit did not comply with the requirement of California law, this fact would not under federal authorities lead to the conclusion that the judgment of the District Court made upon such service was a nullity and *coram non judice*.

Appellee, discussing the applicability of the case of *Pennoyer v. Neff*, *supra* (pages 30-31 of her brief), tries to distinguish the *Pennoyer* case on two grounds: First, that there is nothing in the opinion in *Pennoyer*

v. Neff which indicates the character of the defects in the affidavit, and that there is certainly nothing in the decision to indicate that the affidavit was attacked because it contained no competent evidence and was mere hearsay; second, that the case arose under the laws of Oregon and that the Supreme Court was interpreting Oregon law in the light of decisions of Oregon Courts.

We answer this comment as follows: First, in our opening brief (pages 2-22), we have quoted verbatim the affidavit for publication in the case of *Pennoyer v. Neff*, supra, which merely stated "that defendant Marcus Neff is a non-resident of this state, that he resides somewhere in California, at what place affiant knows not, and he cannot be found within this state". We referred for this quotation to the report of the trial Court's decision in *Neff v. Pennoyer*, 17 Fed. Cases, 1279, and we refer again to the detailed statement of facts in that lengthy decision upon which appellee passes silently. The above affidavit which can hardly be surpassed in brevity, was attacked as incompetent evidence to obtain an order granting publication of service because it stated only an ultimate fact, to-wit, that defendant was a non-resident of Oregon and that he could not be found within the state without stating any facts supporting the ultimate conclusion and showing diligent search on the part of plaintiff. This affidavit was considered insufficient under Oregon law by the trial Court, and the trial Court for that reason declared the judgment void. The United States Supreme Court in passing on this decision did not disagree with the trial Court

in that the affidavit was insufficient under state law. However, assuming that the affidavit for publication in stating only ultimate facts and not showing diligence at all, was defective under state law, *the Supreme Court expressed its opinion that defects in an affidavit of publication of summons under state law "can only be taken advantage of on appeal or by some other direct proceeding and cannot be urged to impeach the judgment collaterally"*. Second, it is true that in the case of *Pennoyer v. Neff*, supra, the affidavit was defective according to Oregon law. However, it is a fact which can be taken from the quotation of the Oregon statute in the trial Court's decision, that the Oregon law was identical with the present and the former California law. In fact the trial Court in its decision, which in this point was disapproved by the U. S. Supreme Court, did not cite Oregon cases but California cases for the sufficiency of the affidavit, among them *Ricketson v. Richardson*, 26 Cal. 149, one of the California cases relied on by appellee. Moreover, it is apparently irrelevant whether the defect of the affidavit exists under Oregon law or under California law where the sole question is whether, assuming it to be defective under any state law this is sufficient under federal precedent to make a judgment a nullity.

The other case which we have cited along with *Pennoyer v. Neff* is *Thompson v. Thompson*, 226 U. S. 551, 57 L. ed. 247. We were aware of the fact (cited on pages 22-23 of our opening brief), that in the *Thompson* case the United States Supreme Court reached the conclusion that an affidavit which was

entirely made on information and belief could be used as the foundation for an order for publication of summons under Virginia law. (This holding of the U. S. Supreme Court incidentally shows that the admission of a hearsay affidavit for publication of service is not contrary to due process of law.) However, the Court expressly states a separate ground for its decision, to-wit, that even if an affidavit based upon information and belief for the publication of service would be insufficient under Virginia law "it seems well settled" that a judgment does not become *coram non judice* and therefore void on its face because the affidavit for publication is defective "not in omitting to state the material fact but in the mode of stating it or in the degree of proof".

This is *not an obiter dictum* of the Court (which would also be entitled to the highest respect) but is clearly an alternative ground of the decision and so establishes a binding precedent. (*United States v. Title Insurance and Trust Co.*, 265 U. S. 472, 486, 68 L. ed. 1110, 1114.) It is true that at the end of the opinion the Supreme Court comes back to the first ground—that the local law did not exclude the use of such an affidavit. However, the fact that the Court repeated its first conclusion does not eliminate the alternative ground on which its decision is likewise based. Appellee's further comment on the *Thompson* case is to the effect (page 32 of her brief) that had the United States Supreme Court's attention in *Thompson v. Thompson*, *supra*, been called to the California cases of *Kahn v. Matthai*, 115 Cal. 689, and *In re Behymer*, 130 Cal. App. 200, it would have

had to admit that such was not the law in California. We presume that the United States Supreme Court would have disregarded appellee's proposition, because *Kahn v. Matthai* is a case where a direct attack, and not a collateral attack, was made on a judgment, and the opinion expressly limits the holding to such a type of attack. *In re Behymer* is a decision of a District Court of Appeal, the holding of which is entirely based on *Kahn v. Matthai* where the Court, however, overlooked that the California Supreme Court at all times has distinguished between direct and collateral attack on a judgment in its examination of the sufficiency of affidavits and other requisites of service. (See pages 16 to 21 of this brief.) However, we believe it is entirely immaterial to speculate on the question what the United States Supreme Court "would have had to admit". We are here concerned with a clear precedent contained in a United States Supreme Court decision which seems to us above the discussion of speculative eventualities.

To the same effect as *Pennoyer v. Neff*, supra, and the *Thompson* case, supra, are the following cases:

Cohen v. Portland Lodge No. 142, 152 Fed. 357, which was a case decided by this Court in which a judgment was attacked because of insufficiency of the affidavit for publication of summons. The Court, from a discussion of the affidavit, found "that both probative facts and legitimate inferences of non-residence appeared in the affidavit submitted to the Court". (p. 364.) Then the Court, distinguishing between "conditions of partial and of total failure", said (p. 364):

“Absolute deficiency must exist, however, in the affidavit examined here to warrant the court in ruling that the judgment of the state court was a nullity. And we do not find an absolute deficiency. The affidavit is far more complete than that made by the affiant in the case of *Neff v. Pennoyer*, 3 Sawy. 274, Fed. Cases 10083; yet upon appeal the Supreme Court (95 U.S. 721, 24 L. ed. 565), discussing the statute under which the court made its order, said: ‘There is some difference of opinion among the members of this Court as to the rulings upon these alleged defects. The majority are of the opinion that inasmuch as the statute requires for an order of publication that said facts shall appear by affidavit to the satisfaction of the court or judge, defects in such an affidavit can only be taken advantage of on appeal or by some other direct proceeding and cannot be urged to impeach the judgment collaterally. * * * If therefore we were confined to the ruling of the court below upon the defects in the affidavit mentioned, we should be unable to uphold its decision.’ ”

We further cite the case of *Bull v. Campbell*, 225 Fed. 923, where plaintiff’s affidavit for the publication of summons recited that defendant could not, after due diligence, be found within the state, that the sheriff had returned the service with his endorsement thereon that the defendant could not be found, and that the affiant “is informed and believes that the said defendant J. Warren Coulston resides at Philadelphia in the State of Pennsylvania”. It was claimed by defendant in his attack upon the judgment that it was a nullity because the affidavit upon which the

order was made did not comply with the terms of the statutes of the Territory of Dakota then in force on the subject of constructive service. The statute set forth by the Court in its decision was practically identical with the present California statute. The Court said (at page 929):

“It may be conceded that upon an appeal from a decree entered upon such an affidavit it would be declared insufficient to warrant an order of the court for substituted service, a question not before us and therefore not determined; but it would not follow that a decree based upon such an affidavit and order would make the decree absolutely void, so that it could be attacked in a collateral proceeding. No authority has been called to our attention in the very elaborate brief of counsel for defendant, nor in the oral argument, to any decision of the Supreme Court of the Territory of Dakota or the State of South Dakota, where such a judgment or decree has been declared void when collaterally attacked, nor have we been able to find any such authority. The court which acted on the affidavit held it sufficient and if it erred the error can only be corrected by appeal. The decree cannot be attacked collaterally. *Applegate v. Mining Co.*, 117 U.S. 255, 29 L. Ed. 892; *Pennoyer v. Neff*, 95 U.S. 714, 721, 24 L. ed. 565.”

Then the Court cites the relevant holding in *Pennoyer v. Neff*, *supra*, and calls attention to the fact that in the United States Supreme Court's decision in *Pennoyer v. Neff*, it appears in italics that the Oregon statute requires, before an order for publication be made, that the relevant facts appear by affi-

davit to the satisfaction of the Court or judge. Referring to Sec. 412 of the California Code of Civil Procedure, we call attention to the fact that the same words which were italicized by the U. S. Supreme Court appear in the California statute. The case of *Bull v. Campbell*, at page 929, refers to *Marx v. Ebner*, 180 U. S. 314, 319, 45 L. ed. 547. In that case the affidavit was almost identical and the language of the statute practically the same. The Court therefore cites from *Marx v. Ebner*, supra, as follows:

“We think, where the affidavit shows that the defendant is a nonresident of the district and that personal service cannot be made upon him, and the marshal, or other public officer to whom the summons was delivered, returns it with his indorsement that after due and diligent search he cannot find the defendant, such proof is sufficient to give jurisdiction to the court or judge to decide the question. It is not to be expected that positive proof that the defendant cannot be found within the state or district will always be attainable. Facts must appear from which it will be a just and reasonable inference that the defendant could not after due diligence be found, and that due diligence has been exercised, and we think such an inference is reasonable when proof is made that the defendant is a nonresident of the state, and there is an affidavit that personal service cannot be made upon him within its borders, and there is a certificate of the marshal such as appears in this case.”

In *Galpin v. Page*, 85 U. S. 350, 21 L. ed. 959 (referred to on p. 38 of appellee's brief), a different

question was before the Court in a case where service by publication was made on a non-resident of the state charging his property in the state. In that case plaintiff had never made an application to the Court for an order granting his publication of service. The Court held that there was no service of process upon which a judgment standing up against collateral attack could be based, since the publication of service "was the voluntary act of complainant without judicial authority or sanction". (21 L. ed. at p. 961.)

In the cases of *Noble v. Union River Logging Co.*, 147 U. S. 165, 37 L. ed. 123, and *Stoll v. Gottlieb*, 305 U. S. 165, 93 L. ed. 104, 111 (see pages 15-16 of our opening brief), the Court distinguished between strictly jurisdictional facts, the lack of which makes a judgment a nullity, and quasi-jurisdictional facts which are not subject to collateral attack. Appellee, on page 12 of her brief, claims that her present attack on the judgment of the District Court relates to strictly jurisdictional facts in the meaning of two categories listed in the *Noble* case, to-wit, "the service of process within the state upon the defendant in a common law action" and "a publication in strict accordance with the statute where the property of an absent defendant is sought to be charged".

The first of these categories relates to personal service on the defendant within the state in a common law action. The quotations of the Court following this category show that the Court referred to the rule that defendant cannot be reached outside the state by personal service in the common law sense, and that

such service outside the state does not subject the defendant to the jurisdiction of the Court. In the instant case the jurisdiction of the Court is not based on personal service outside the state nor on any kind of personal service in the common law sense so that this category referred to in the *Noble* case as one where strictly jurisdictional facts are in issue, does not apply.

The second category, referred to by appellee, relates to jurisdiction where the publication is made against an absent defendant and because there is property of such defendant in the state which is sought to be charged. The language of the Court in determining this category and the citations following it clearly show that this category refers to the familiar situation where a non-resident, although not personally subject to the jurisdiction of the Court, is made a defendant with respect to property which he holds within the state and which is sought to be charged.

In the present case, the jurisdiction of the Court was not based on the fact that defendant, was a non-resident and owned property within the state but on the ground that defendant was a resident of the state which is sufficient to bring her within reach of the jurisdiction of the Courts in the state by substituted service and even by personal service without the state. In the case of *Milliken v. Meyer*, 311 U. S. 457, 85 L. ed. 278, the Court points out:

“As in the case of the authority of the United States over its absent citizens (*Blackmer v. U.*

S., 284 U.S. 421, 76 L. ed. 375) the authority of a state over one of its citizens is not terminated by the mere fact of his absence from the state. The state which accords him privileges and affords protection to him and his property by virtue of his domicile, may also exact reciprocal duties.”

According to this fundamental notion, a resident of a state, even if he is temporarily absent, remains within the reach of the state’s jurisdiction for purposes of a personal judgment and can be served by appropriate substituted service. The Court has recognized that in such a case the service is adequate so far as due process is concerned, even where the defendant was personally served without the state.

From a reading of the case of *Milliken v. Meyer*, *supra*, it becomes clear why the Court, in the list of strictly jurisdictional facts in the *Noble* case, does not include the category of publication of service in cases where a resident defendant is served by publication because he cannot be found within the state. The *Noble* case also apparently could not include this type of facts in the list of strictly jurisdictional facts because *Pennoyer v. Neff*, *supra*, and *Thompson v. Thompson*, *supra*, clearly indicate that defects of an affidavit in such a case are not sufficient to make the judgment void.

In our quotations of federal authorities we have not distinguished between those where publication of service was made to charge the *property* of a non-resident defendant and where constructive service

was made against a *resident defendant* because of temporary absence from the state, because the cases relating to constructive service where the property of an absent defendant is to be charged, are clearly to the effect that defects in the affidavit for publication of summons do not render a judgment a nullity even in that type of case. (See *Marx v. Ebner*, supra.)

The reason why we pointed out in our opening brief, as well as in the present brief, that the question of whether the judgment is a nullity is governed by federal law, has been misunderstood by appellee, since she claims that we are "fighting shy" of California citations (page 27 of her brief). As the authorities are clearly to the effect that federal law governs, we believe that California authorities on this point can only be of interest as they follow the same rule as the federal Courts.

Having this limited purpose in mind we are discussing the California cases which clearly distinguish between direct and collateral attack on a judgment holding that in the case of a direct attack an affidavit for publication of service can be scrutinized whereas this cannot be done where a judgment is final and the attack is a collateral one.

This rule was clearly expressed in the recent case of *City of Salinas v. Lee*, 217 Cal. 252, 255, where the Court said that an attack made after expiration of the period prescribed in Sec. 473 of the California Code of Civil Procedure, is governed by the rules applicable to collateral attack, and therefore must be presented and determined upon the judgment roll

alone. However, the fact that the judgment roll alone can be resorted to is by no means the only effect under California law of the applicability of the rules for collateral attack. The Court in the *City of Salinas* case squarely holds that upon collateral attack "every presumption is in favor of the validity of the judgment, and any condition of facts consistent with its validity will be presumed to have existed rather than one which will defeat it." (p. 256.)

In the case of *Kaufmann v. California Mining etc. Syn.*, 16 Cal. (2d) 90, the Court refuses to give consideration to the authorities cited by appellants involving direct attacks rather than collateral attacks upon judgments. In support of the presumption in favor of the validity of the judgment, relied on in the *City of Salinas* case, the Court points out that where it does not affirmatively appear from the judgment that the findings were based solely upon any particular document or documents relating to service of summons, the presumptions in favor of the validity of the judgment make said findings conclusive upon collateral attack "even though there may have been defects in some of the documents constituting a part of the judgment roll and relating to the service of summons". The Court cites *Hahn v. Kelly*, 34 Cal. 391, *Musser v. Fitting*, 26 Cal. App. 746, and other California cases for the doctrine that upon collateral attack the jurisdictional recitals in the judgment are considered to be conclusive proof of service, and that if the proof of service on record is defective in view of such recitals, it is presumed "that the court had other

sufficient proof of service than that which remains on file”.

It appears from the foregoing that appellee is wrong in her assumption that the only difference in California between a direct attack and a collateral attack is that upon the former form of attack extrinsic evidence can be submitted, while upon the latter only evidence which appears from the record. (See appellee’s brief, p. 13.) It is true that this is one factor distinguishing both types of attack, but it is by no means the only factor which is important under California law. Appellee tries to distinguish the *Kaufmann* case, *supra*, from the present case (see p. 43 of her brief) in that under the facts of the *Kaufmann* case service was attempted not only by publication but also by service upon the secretary of state and by attachment. However, the *Kaufmann* case, *supra*, at pages 91-92, expressly cites with approval *Rue v. Quinn*, 137 Cal. 657, for the rule that the ordinary rules governing a direct attack have no bearing under the circumstances. *Rue v. Quinn*, *supra*, dealt with alleged defects of an affidavit for an order granting publication of service. There it was said that the recitals of a judgment are conclusive and that the law will presume that the Court had other sufficient proof of service than that which remains on file if the papers on record would show a defective and void service.

The *Kaufmann* case, adopting these former holdings of *Rue v. Quinn*, *supra*, is the latest decision in point in California, and it seems to us that under

this decision upon collateral attack the presumption in favor of the validity of the judgment will always protect the judgment where the recitals of the judgment are not such that they negative the sufficiency of the service.

The cases of *Ricketson v. Richardson*, supra, and *Columbia Screw Co. v. Warner Lock Co.*, 138 Cal. 445, are cases where the judgment was directly attacked so that the rules applicable were different. In the case of *Braley v. Seaman*, 30 Cal. 610, it also appears that the judgment was attacked upon appeal by the defendant.

It is therefore of particular interest to note the difference in the rules applied by the Court in *Rue v. Quinn*, supra, a case where the attack was collateral, from those rules which the same Court had formerly applied in *Ricketson v. Richardson*, supra, and *Braley v. Seaman*, supra, upon direct attack. The case of *Kahn v. Matthai*, supra, is likewise a case of direct attack upon a judgment, and it was thereafter held in *Rue v. Quinn*, supra, at p. 656, that even though under the authority of *Kahn v. Matthai*, supra, upon an attack within the period prescribed by Sec. 473 of the California Code of Civil Procedure, the order for publication of service possibly could have been reviewed upon the ground that the evidence was insufficient to justify the finding of due diligence, *Kahn v. Matthai*, supra, was no authority because the motion was not made until after the time for an appeal had expired.

In fact, the case of *Rue v. Quinn*, supra, makes it impossible to cite *Kahn v. Matthai*, supra, as a California authority in connection with collateral attack on a judgment. This leaves the case of *In re Behymer*, supra (a decision of a California District Court of Appeal), the only authority in California where upon collateral attack a judgment was declared void because of defects in an affidavit for the publication of summons. In that case the plaintiff had used a form-blank for the affidavit for publication of summons and had claimed as present all four alternatives mentioned in Sec. 412 of the Code of Civil Procedure (which in itself made the affidavit contradictory). The affidavit then stated that plaintiff had employed a certain McClafin to ascertain the whereabouts of the defendants, and was informed by him that he could not find any of the officers of the defendant corporation, and that the corporation had defaulted its charter and was not now in existence. In addition thereto the affidavit stated that affiant had interviewed the city assessor, the tax collector, and the city clerk of Long Beach, California (where said corporation had its principal office) and the Alamitos Land Co., who owned property near the property of the defendant corporation, but could not learn from any of them the whereabouts of any of the defendants.

The Court based its judgment mainly on two points, to-wit, (1) insufficiency of the affidavit in that *all the statements* showing diligence were hearsay, and (2) that where service of process upon a defendant within the county is attempted to be made by a person other

than the sheriff, his affidavit should *as a rule* be required showing the nature of the effort made to serve the party.

The reason for the Court's decision is not given in its own language but it cites verbatim the language of the California Supreme Court in *Kahn v. Matthai*, supra. It is apparent from this citation and the Court's silence on the case of *Rue v. Quinn*, supra, that the District Court of Appeal entirely overlooked that *Kahn v. Matthai*, supra, was a decision in a case limited to a direct attack on a judgment and that the California Supreme Court, construing its own decision in *Kahn v. Matthai*, supra, had expressly stated in *Rue v. Quinn*, supra, that *Kahn v. Matthai*, supra, was not applicable to a collateral attack upon a judgment. The fact that the District Court of Appeal did not even cite the previous decision of *Rue v. Quinn*, supra, makes it clear that the Court's attention had not been called to the case of *Rue v. Quinn*, supra, which is still the representative authority in California on the subject and which was approved in the most recent case of *Kaufmann v. California Mining Co.*, supra.

But even disregarding the fact that the case of *In re Behymer* is entirely based on its citations from *Kahn v. Matthai*, supra, which was not applicable, it also appears that the Court limited its decision to a case where *all* the statements showing diligence were hearsay and where no attempt by the sheriff to serve process had been made. In both respects the case of *In re Behymer* is clearly distinguishable from the present case.

IV.

THE MARSHAL'S CERTIFICATE IS ADMISSIBLE EVIDENCE
FOR AN ORDER OF PUBLICATION OF SERVICE.

Appellee states on page 44 of her brief that an affidavit is the *only* evidence which is admissible for an order for publication of service under Sec. 412 of the California Civil Code. However, appellee is not able to cite any California authority bearing out her contention, and the only authority which she cites to the Court that even a sheriff's return can not be considered unless in affidavit form, is *Grigsby v. Wopschall*, 127 N.W. 605. We do not believe that the California law on service by publication can be proven by a citation from another jurisdiction where in fact it has been said that a sheriff's return cannot be considered unless in the form of an affidavit made for publication of service. The California decisions and the federal decisions are *unanimous* to the effect that the sheriff's or marshal's certificate is admissible proof for publication of service even where the statute (as the California statute does) provides the facts to appear "by the affidavit" to the satisfaction of the Court or judge or justice thereof.

The question was given special attention by the United States Supreme Court in *Marx v. Ebner*, supra, where the Court dealt with the Alaska statute which is quoted in its decision and which is practically identical with the California statute on this point. The Court in that case held that along with the affidavit which showed that the defendant was a non-resident of the district and that personal service could not be made upon him, the marshal's or other

public officer's return (to whom the summons was delivered) could be considered as evidence that after due and diligent search defendant could not be found; and discussing the weight of the marshal's certificate, the Court states at the end of the opinion (45 L. ed. at p. 550):

"Facts must appear from which it will be a just and reasonable inference that the defendant could not after due diligence be found, and that due diligence has been exercised, and we think such an inference is reasonable when proof is made that the defendant is a non-resident of the state, and there is an affidavit that personal service cannot be made upon him within its borders and there is a certificate of the marshal such as appears in this case. There is too, some presumption that the public officer who has received the process for service has done his duty and has made the reasonable and diligent search for the defendant that is required. Some such presumption is not alone sufficient in the absence of all proof of other facts, but when such other facts as appear in this case are sworn to, it may add some weight to them as a presumption in favor of the performance of an official duty."

In the case of *Cohen v. Portland Lodge No. 142*, supra, this Court applying the Oregon statute which was identical with the present California statute, said:

"This is affiant's statement of the substance of the record in the case; yet it is fairly entitled to be accepted as an accurate resume of what the record shows, made by an attorney of the court. This statement is evidence, though subject to the criticism that it is not of as good quality or grade

of evidence as the record itself would have been had copy thereof been incorporated as part of the affidavit. But it was not necessarily inadmissible solely on that account, and the court was justified in attaching to the declaration of the affiant such importance and weight as it would have given to the record return by the sheriff. When weighed by the court the official statement by the sheriff touching the things he was required by law to do by way of serving the defendant in the mortgage foreclosure suit with process, was at least *prima facie* evidence of the defendant's absence from that county in the state wherein the sheriff exercised official authority." (152 Fed. at p. 362.)

In the instant case the marshal's return was a part of the record and before the Court when it made the order for publication of service which order expressly recites: "And it further appearing to the satisfaction of the judge from said affidavit and from other evidence." (Tr. p. 60.) Moreover, Herrington's affidavit incorporates by reference the marshal's return. (Tr. p. 50.)

The following California cases clearly admit the sheriff's certificate as evidence:

Rue v. Quinn, *supra*, where the Court says, at the bottom of page 657:

"The sheriff's return may be relied upon as part of the evidence that the defendant cannot be found within the county * * *."

Weis v. Cain (Cal.), 73 Pac. 980, which case held that under California law upon collateral attack, an

affidavit for the service of summons by publication was sufficient which stated that the summons had been placed in the hands of the sheriff of the county for service, that the sheriff had returned it with his return endorsed thereon to the effect that he could not find the defendant within the county, and that affiant did not know the residence of the defendant.

In the case of *Clarkin v. Morris*, 178 Cal. 102, 104, the affiant stated no affidavit of the sheriff being submitted that the summons had been given to the sheriff with instructions to serve the same on said defendant, and that his return thereon had stated that he could not find the said defendant in the county of Los Angeles. The Court admitted this proof referring to the case of *Rue v. Quinn*, supra, where "the affidavit in controversy stated the return of the Sheriff similar to that in the present case".

Also in the case of *Ligare v. California S. R. R. Co.*, 76 Cal. 610, at page 612, diligence was proven by an affidavit that the summons and alias summonses had been placed in the hands of the sheriff of a certain county, and thereafter in the hands of other sheriffs, with instructions to make service but that they all had returned the summonses with endorsed returns thereon or written responses that they had made diligent inquiry and search within their counties and could not find any of the defendants. (See the quotation from the the *Ligare* case on pp. 36-37 of our opening brief.)

From this case it will be noted that the Court not only did admit the certificate of the sheriff as evi-

dence, but also the statements in the affidavit that the sheriffs had returned the summonses with their writs endorsed thereon *or written responses*. Therefore in this case not only an official certificate but also written responses of the sheriffs were considered good evidence, as cited by affiant in his affidavit. We make special reference to this point because Herrington's affidavit not only incorporates by reference the marshal's return but also states extensively the written responses received from the marshal which clearly indicate due diligence on the part of the appellants, and also that appellee was concealing herself to avoid service.

V.

IN A COLLATERAL ATTACK THE RECITALS OF THE JUDGMENT ARE BINDING AND CONCLUSIVE AS TO THE FACT OF SERVICE.

The default judgment of the District Court recites (Tr. p. 67):

“The defendant Grace Appleton McKey, sued herein * * * having been duly and regularly served with summons * * *.”

The order for publication of summons (Tr. p. 60) recites:

“And it further appearing to the satisfaction of the Judge from said affidavit and from other evidence, and the court finds that * * * diligent search has been made for said defendant Grace Appleton McKey in the State of California and within the jurisdiction of this court in order to

serve said subpoena and said alias subpoena upon her, and that said defendant cannot, after due diligence be found within the State of California or the jurisdiction of this court, and that said defendant has been and now is concealing herself to avoid the service of said process.”

The recitals of the judgment show due service without specifying how the service was made.

Therefore, what has been said in *Hahn v. Kelly*, supra, applies: that if the judgment recites due service of process without specifying how the service was made or referring to any paper as proof of it, the recital is conclusive on the parties in a collateral proceeding. Also in point is the following citation from the *City of Salinas v. Lee* case, supra (p. 256):

“It does not appear that said recital was at all based upon the original and deficient affidavit of publication. It may well be that prior to or at the time of the entry of judgment it was made to appear to the trial court *by other means* that due publication of summons had been had. It will therefore be presumed in support of the judgment, and in conformity with the above cited cases, that *proof other than the original affidavit was introduced satisfying the court below of the fact of due and proper service of the defendant and of the regularity of the default.*” (Italics ours.)

Appellee seems to rely on the theory that a diligent search for defendant and the fact that defendant concealed herself to avoid service can be proved under Sec. 412 of the California Code of Civil Procedure

only by affidavit so that the Court cannot rely on anything but an affidavit and the recital in the judgment can only therefore refer to an affidavit on record. Appellee tries to distinguish the present case where an affidavit to obtain an order of publication of service is under scrutiny from the other cases where an affidavit of publication is claimed to be defective. However, Sec. 415, subdivision 3 of the Code of Civil Procedure provides that in the case of service by publication, proof of service of summons and complaint "must be" by the affidavit of the printer and other persons named in said subdivision. There is therefore no difference with reference to an affidavit under Sec. 412 dealing with and serving as proof for the grounds of service by publication, and under Sec. 415 serving as proof for the publication. In both cases the California Courts have construed the law to mean that in the case of a collateral attack it shall be presumed that if the affidavit for publication or the affidavit of publication is defective, other proof than that by affidavit was before the Court, and that such proof was not defective and insufficient. In other words, the California Courts in cases of collateral attack consider the recitals of due service in the judgment as binding even if the papers on record are defective. They base their holding on the presumption that other satisfactory proof has been before the judge or Court. The recitals of the judgment can only be disregarded where the lack of jurisdiction *affirmatively* appears from the record.

As the Court said in the most recent case (*Kaufmann v. California Mining Synd.*, supra, at p. 93):

“It does not *affirmatively* appear that these findings were based solely upon any particular document or documents relating to service of summons, and under these circumstances the presumptions in favor of the validity of the judgment made said findings conclusive upon collateral attack even though there may have been defects in some of the documents constituting a part of the judgment roll and relating to the service of summons.”

The *Kaufmann* case, at page 93, in support of this statement, refers to *Hahn v. Kelly*, *supra* (p. 431) where the Court had distinguished between a judgment referring for proof of service generally to a paper or papers on file where the presumption would be that the Court had other sufficient proof of service than that which remains on file, and the case where the judgment recites due service of process without specifying how the process was made, or referring to any paper as proof of it where “the recital is conclusive on the parties in a collateral process”. The *Kaufmann* case, relying on this and other quotations, makes it perfectly clear what is meant by the holding that the collateral attack “must fail unless the invalidity of that judgment affirmatively appears upon the face of the judgment roll”: the judgment must affirmatively refer, as its sole basis, to a document which shows irregularity of the proof of default or improper service, or the judgment itself must affirmatively show such defects. So long as the judgment either refers generally to the papers on record or not even naming the papers on record, it must be

presumed that there was other proof before the Court than that still on record. Mere defects in a paper on record can, under these circumstances, in no case affirmatively show irregularity in obtaining or performing the publication of service.

Appellee remains silent on the *Hahn v. Kelly* case and tries to distinguish the *Kaufmann* case because there the service was attempted not only by publication but also by other means. However, it cannot be seen why the recitals of the judgment should be binding and conclusive if service has been tried one way and lack conclusiveness if another mode of service has been attempted.

The *Kaufmann* case clearly indicates that the conclusiveness of the recitals of due process in the judgment applies to all three modes of service which were attempted in the *Kaufmann* case, therefore the service by publication was one of those attempted modes of service.

It follows that also the cases of *Rue v. Quinn*, supra, *Musser v. Fitting*, supra, *City of Salinas v. Lee*, supra, and *Sacramento Bank v. Montgomery*, 146 Cal. 745 at pages 750, 751 (which are cited in the *Kaufmann* case), are in point, and that the holdings in those cases that the recital of due service must be taken as true, covers all types of service and all steps necessary to accomplish service of process.

In the case of *Rue v. Quinn*, supra, the Court refers at page 655 to the order directing the publication of service in which the judge recited "that it satisfactorily appeared to him from the said affidavit that

the defendant Louisa Munro could not after due diligence be found within said state * * *.” Referring to this case the Court says at page 656: “If the facts set forth in the affidavit have a legal tendency to show the exercise of diligence on behalf of the plaintiff in seeking to find the defendant within the state, and that after the exercise of such diligence he cannot be found, the decision of the judge that the affidavit shows the same to his satisfaction is to be regarded with the same effect as is his decision upon any other matter of fact submitted to his judicial determination.”

Likewise the case of *Ballard v. Hunter*, 204 U. S. 241, 51 L. ed. 461, is in point since the California decisions show that lack of defects in an affidavit for publication of service is not a jurisdictional requirement and that jurisdiction can be obtained even if the affidavit was defective.

VI.

HERRINGTON'S AFFIDAVIT WAS SUFFICIENT UNDER CALIFORNIA PRACTICE TO SUSTAIN THE ORDER FOR PUBLICATION OF SUMMONS EVEN UPON A DIRECT ATTACK UPON THE JUDGMENT.

Appellee's brief (see p. 1) contains the statement that the order for publication of summons was procured by an affidavit “which recited the purported unsuccessful efforts of a specially hired process server in Los Angeles, and to a slight degree the efforts of a deputy marshal to locate and serve appellee, de-

fendant". (Italics ours.) Appellee regards all statements concerning the activities of the process server and the deputy marshal as entirely hearsay, and concludes, on page 37 of her brief, as follows: "We do not believe an affidavit could be found on the books more afflicted with hearsay." We do believe, in fairness, that these statements do an injustice to Herrington's affidavit, and we therefore find it necessary to analyze his affidavit.

For the purpose of analysis of Herrington's affidavit, we distinguish three parts of the affidavit:

(A) Herrington's statements on the instructions given by him to the marshal and on the marshal's return and written responses;

(B) Herrington's statements on the instructions given by him to Leo K. Gold regarding service of process on appellee, and Gold's written reports on the failure of his efforts to serve appellee;

(C) Herrington's statements on the diligent search made by him and the other attorneys for appellants and on the fact that appellee concealed herself to avoid service, and that he and the other attorneys for appellants were unable to locate defendant.

A.

HERRINGTON'S STATEMENTS ON THE INSTRUCTIONS GIVEN BY HIM TO THE MARSHAL AND ON THE MARSHAL'S RETURN AND WRITTEN RESPONSES.

Herrington states in his affidavit that he had been informed by the receiver of the insolvent bank that the books and records of the bank showed 1550 North

Fairfax Avenue, Hollywood, as appellee's address. (Tr. p. 46.) He further informed the marshal that Leo K. Gold, employed by Herrington as private investigator, had advised him of another address of appellee to which she had moved from said Hollywood address, to-wit, 116 So. Clybourne Street, Burbank, California. (Tr. p. 48.) These instructions given by Herrington to the marshal are stated in his affidavit as facts being known to Herrington.

Appellee's own affidavit in support of her motion (Tr. p. 76) shows that she claims to have resided during the time service was attempted at 1550 No. Fairfax Avenue, Los Angeles, or 116 So. Clybourne Street, Burbank. Thus appellee, by her own statement, indicates that Herrington's instructions to the marshal as to appellee's address in the state were correct, so that by no greater degree of diligence could Herrington have given better instructions to the marshal.

The marshal himself advised Herrington (Tr. p. 47) he had ascertained that appellee received her mail at 119 24th Street, Hermosa Beach, California, at which last mentioned address another of the defendants in the suit, namely Kathryn Riddell, resided, and at which address said Kathryn Riddell was served with process by the marshal. (See Herrington's affidavit, Tr. p. 49, and the marshal's return on service upon Kathryn Riddell, Tr. p. 40.) Under Herrington's instructions to the marshal which are stated in detail in the affidavit, the marshal attempted to serve the subpoena upon appellee at all three ad-

dresses above referred to. (See Tr. p. 48, where Herrington in his affidavit states as follows):

“That on or about January 27, 1937, said marshal wrote affiant that he had made several attempts by three different deputy marshals, to serve said defendant at 111 and 116 South Clybourne Street, Burbank, California, and also at 119 Twenty-fourth Street, Hermosa Beach, California, and also at 1550 Fairfax Avenue, Hollywood, California, and that persons at these premises always advised that the defendant did not reside there or was away and refused further information concerning her whereabouts; said marshal also stated that he was attempting to serve said defendant in another action for some Los Angeles attorneys.”

After having spent two months in such attempts to serve appellee at one of the above addresses, the marshal wrote on February 26, 1937, as stated in the affidavit, that he had definitely established that appellee was residing at the address known as 119 Twenty-fourth Street, Hermosa Beach (Tr. pp. 49-50), but that in spite of three different trips made by his deputy he had been unable to serve appellee because no one had responded or answered the door on the calls. (Tr. p. 50.) After more than two months of futile attempts to serve appellee at those addresses, the marshal advised affiant and the other attorneys, as is again stated in the affidavit, that he considered his efforts unsuccessful and therefore believed it advisable to return the subpoena to the clerk with an affidavit showing his inability to serve appellee. (Tr. p. 50.) The affidavit further states the suggestion

by the marshal to move the Court to appoint Leo K. Gold, who co-operated with the marshal's office for the purpose of serving appellee, as the person to make service. The affidavit finally incorporated by reference the marshal's return which is composed of three returns by three different deputy marshals who had tried to serve appellee. (Tr. pp. 36, 37, 50.)

B.

HERRINGTON'S STATEMENTS ON THE INSTRUCTIONS GIVEN BY HIM TO LEO K. GOLD REGARDING SERVICE OF PROCESS ON APPELLEE, AND GOLD'S WRITTEN REPORTS ON THE FAILURE OF HIS EFFORTS TO SERVE APPELLEE.

As to Leo K. Gold's prior efforts to assist the marshal in serving appellee, the affidavit states that Leo K. Gold had furnished the above Burbank address of appellee (Tr. p. 48) and that he had so enabled affiant to give this address to the marshal.

The affidavit further states (Tr. p. 49) that affiant had been informed by Leo K. Gold that appellee and Kathryn Riddell, who was served as defendant in the same action, were sisters-in-law (Tr. p. 40) and therefore affiant upon information and belief alleges that appellee learned of the pendency of the suit and anticipated she would be served as a defendant therein and that she therefore concealed herself to avoid service.

After the order of Court officially appointing Gold to serve process according to Herrington's affidavit, Leo K. Gold on April 1, 1937, accepted receipt of the alias subpoena and reported in writing to affiant that he was endeavoring to serve the same on appellee

at the various addresses above referred to. The affidavit states on written reports of Leo K. Gold, relating to his efforts to serve process as of the following dates: March 16, 1937, April 1, 1937, April 5, 1937, April 27, 1937, June 25, 1937, September 14, 1937, September 24, 1937, November 6, 1937, November 19, 1937, June 11, 1938, August 19, 1938. (Tr. pp. 51-56.) All of these reports of Gold dealt with intensive and constant efforts made by the Court's officially appointed process server to achieve service. The affidavit states that according to his written reports Gold inquired from neighbors at the various addresses that he tried to find out the telephone number where appellee could be reached; that he examined the Los Angeles city directory going back a number of years; that he made inquiries of the tax collector's office at Hermosa Beach and found that Kathryn Riddell had instructed the tax collector to send her the tax bills on the Hermosa Beach property and also on the Burbank property (which was one of the addresses of appellee) although said properties were recorded in the name of Elizabeth Gordon. (Tr. p. 54.)

Affiant further states (Tr. p. 55) that on or about December, 1937, he learned that the law firm of Meserve, Mumper, Hughes and Robertson, with offices at 555 So. Flower Street, Los Angeles, were attorneys for certain plaintiffs in a suit in the Federal Court at Los Angeles, in which appellee was a defendant, and that they were endeavoring to effect service of process in said action upon appellee. Affiant further states, as a matter of his own knowledge, that he inquired of those attorneys concerning the whereabouts

of appellee and received from them a letter dated December 11, 1937, stating that they had made numerous attempts to effect service of process on appellee but without success; that a deputy U. S. Marshal had made several trips to the aforementioned Hermosa Beach address and the Burbank address without succeeding in contacting or serving appellee, and also that they had sent out their office clerks on a number of different occasions to said addresses to locate appellee. Affiant states (Tr. p. 56) as a matter of his own knowledge that a few months thereafter (in August 1939) he gave Leo K. Gold this information which he had received and suggested that to assist in locating appellee he call at the office of these Los Angeles attorneys to inquire of them if they had had any better success in locating or serving said defendant in the action they were handling. (Tr. p. 56.) Affiant again, as a matter of his own knowledge, states that in response to this letter which he had directed to Leo K. Gold he received Gold's answer under date of August, 1938, stating that Gold had followed the instructions given by affiant and that he had been informed by the attorneys that they were still trying to locate and serve appellee. Affiant states in the same letter he was informed by Gold that he had completely re-covered the ground covered during the past year in attempting to locate appellee and also Kathryn Riddell, and that according to his written report Gold had searched and rechecked the city directory and the telephone directory, also the newly compiled voters' register, without finding any additional clues as to the whereabouts of appellee and Kathryn Riddell. (Tr. p. 56.)

C.

HERRINGTON'S STATEMENTS ON THE DILIGENT SEARCH MADE BY HIM AND THE OTHER ATTORNEYS FOR APPELLANTS AND ON THE FACT THAT APPELLEE CONCEALED HERSELF TO AVOID SERVICE, AND THAT HE AND THE OTHER ATTORNEYS FOR APPELLANTS WERE UNABLE TO LOCATE DEFENDANT.

Toward the end of his very explicit and detailed affidavit, Herrington makes the following statements (Tr. pp. 56-57):

"That in view of the foregoing, affiant and plaintiff's attorneys have decided it would be futile to spend further time, effort, and money in an attempt to effect personal service of process on said defendant."

Affiant then swears to the fact

"that said defendant Grace Appleton McKey cannot, after due diligence, be found within the State of California and cannot personally be served with subpoena or other process in this suit."

Affiant also swears

"that affiant and said attorneys have made a diligent search for said defendant and have made inquiries of each and every person whom they could expect, or had any reason to believe, they would receive information as to the whereabouts of said defendant; that affiant and said attorneys do not know the present whereabouts of said defendant and cannot learn her present whereabouts * * *."

Upon his information and belief affiant swears to the fact

“that said defendant at all times since the commencement of this action has been and now is concealing herself to avoid the process of subpoena and other process herein, and that she will continue to so conceal herself for the purpose aforesaid.”

All these allegations in the affidavit (Tr. p. 57) are co-ordinated with each other and by no means are subordinated to the statement that in view of the statements made in the foregoing parts of the affidavit affiant's and plaintiff's attorneys had decided that further efforts to serve appellee would be unavailing.

On pages 37 and 50 of her brief appellee comments on Herrington's statements in his affidavit which are neither hearsay nor to a large and decisive part made on information and belief, and she accuses us of having “conveniently overlooked” the fact which appellee had to call to the Court's attention that Herrington prefaced his foregoing statements in his affidavit with the statement “that in view of the foregoing” affiant and the other attorneys of plaintiff had decided that further efforts to effect personal service of process on appellee would be futile. However, appellee entirely overlooks that the five statements appearing in that paragraph of Herrington's affidavit which starts at the bottom of page 56 of the transcript and ends at the bottom of page 57, are independent statements. They all commence with the word “that”; each of them is severed from the foregoing by a semicolon. The first statement gives the

reason why affiant and the other attorneys for plaintiff were at that time moving the Court to grant publication of service. The second statement gives the general conclusion that appellee cannot be found after due diligence within the State of California. The third statement, made on information and belief, is again an independent statement, in which affiant upon information and belief swears to the fact that appellee was concealing herself to avoid service. The fourth independent statement, based upon the affiant's own knowledge, assures the Court that affiant and his colleagues have done everything in their power to serve appellee with process, and that they for that purpose made diligent search and made inquiry of each and every person whom they had any reason to believe would receive information as to the whereabouts of defendant (this affidavit being made after more than two years' effort). The fifth statement is also independent and absolutely necessary in a case of this sort in that it assures the Court that affiant and the other attorneys for plaintiff are not aware of the whereabouts of defendant and cannot learn them. Each of these statements must be taken independent of the other. Herrington swore without any limitations that he was unable to ascertain the whereabouts of appellee; he likewise swore that diligent search had been made by him inquiring of each and every person from whom he could expect or had reason to believe that he would receive information as to appellee's whereabouts. He did not limit in any way his statements covering all his efforts to locate appellee.

Appellee's attempt to redraft Herrington's affidavit so as to make it more cautious than it is, is futile in view of the clear language used by the affiant. This language exposed him to punishment for perjury if any of his statements were incorrect or false.

D.

CONCLUSION.

We believe that Herrington's affidavit can be most aptly characterized by the language which this Court used in *Cohen v. Portland Lodge*, supra, at page 363:

"We agree that behind each of the material probative facts there should stand the affidavit of some one who can be subjected to the pains and penalties of perjury if his affidavit is criminally false, but we disagree with the view that perjury might not be committed. Let us apply the test of a possible charge of perjury. If affiant willfully and corruptly swore that he received the information stated when in truth he had not, and willfully swore that because of the information personal service could not be had, we think he corruptly stated as an ultimate fact that which he could swear to based upon information received, and that, if he knowingly falsely stated the ultimate fact, he would be criminally liable in perjury. So when the several parts of the affidavit are considered we should include the ultimate fact which is in itself positively made, that personal service was not to be had because of the antecedent facts; and when we do so regard it our opinion is that as a whole it contained a sufficient showing for the court to have acted upon."

The authority in California law on which appellee mainly relies is the case of *Kahn v. Matthai*, supra.

where the Court expressly states that it was concerned with a direct rather than a collateral attack on a judgment, and that it was scrutinizing the affidavit for publication upon such direct attack. The affidavit to which the Court there refers in substance merely stated that plaintiff's attorney placed the summons and complaint in the hands of five different persons who were named in the affidavit, and that they returned them with information they could not find defendant or see her, and that she could not be found in the city or county. In that case the Court found that such an affidavit was insufficient upon direct attack and held that where service of process upon a defendant within the county "is attempted to be made by a person *other than the sheriff*, his affidavit should *as a rule* be required showing the nature of the effort made to serve the party, and where practicable the reasons why such service could not be had". This citation shows that the Court in *Kahn v. Matthai*, supra, even upon direct attack would have been satisfied with Herrington's affidavit because the Court indicates that the sheriff's affidavit is not needed where his returns and reports are stated in another affidavit.

The Court likewise indicates that it is necessary not only to state ultimate facts but also the nature of the efforts made and the reasons why service could not be made. This requirement was amply complied with in Herrington's affidavit which in all details states the nature of the efforts made.

The only further point to be noted from *Kahn v. Matthai*, supra, is that where persons other than the

sheriff attempted service, the Court *as a rule* would require the affidavit of the person who made the efforts. By using the term “as a rule” the Court indicates that this is a matter which is in the discretion of the judge and that no hard and fast rule is applicable. In Herrington’s affidavit he was in a position to base his statement on his own instructions to the marshal and Gold, on the marshal’s written reports and returns, on written reports of the Court’s officially appointed process server, whose reports set forth the facts in all necessary detail, and on additional information received by Herrington himself, so that even upon direct attack, the Court in *Kahn v. Matthai*, supra, we submit, would have been perfectly satisfied with Herrington’s affidavit.

There is no need to discuss at length the case of *In re Behymer*, supra, because it only repeats the holding in *Kahn v. Matthai* without taking into consideration that *Kahn v. Matthai*, supra, is expressly limited to direct attack.

We do not see how appellee can rely upon *Ricketson v. Richardson*, supra, because all that case holds is that an affidavit which merely repeats the language of the statute and so can only state the ultimate facts referred to in the statute, is insufficient upon direct attack. The main point which the Court makes in this case is to be found at the bottom of page 153, as follows:

“The affidavit must show whether the residence of the person upon whom service is sought is known to the affiant, and if known the residence must be stated.”

We are certain that the defects of the affidavit in the *Ricketson v. Richardson* case cannot be found in Herrington's affidavit.

The California Courts are in full conformity with this Court's holding in *Cohen v. Portland Lodge*, supra, in that they hold that there can be recognized no hard and fast rule excluding hearsay from an affidavit for the publication of service. In *Rue v. Quinn*, supra, the Court said (at p. 657):

"From the nature of the question to be determined the evidence thereon must to a very good extent be hearsay, and the number and character of the persons inquired of must in each case be determined by the judge. Diligence is in all cases a relative term, and what is due diligence must be determined by the circumstances of each case."

We therefore submit that Herrington's affidavit is perfectly sufficient under California practice even upon direct attack, not to speak of the case of collateral attack where the California Courts recognize every kind of an affidavit which tends to show diligent search (*Rue v. Quinn*, supra, and *Clarkin v. Morris*, supra.)

The main points which make the affidavit sufficient under California practices are: first, all statements in the affidavit referring to Herrington's own instructions are naturally admissible evidence; second, all statements in his affidavit referring to the sheriff's written reports and returns are equally admissible; third, Herrington's own statements at the end of the affidavit are also admissible and in themselves would probably

stand by themselves and be sufficient to uphold the service; fourth, Herrington's statements on the written reports which he received from Gold must be considered along with his instructions and the fact that Gold was appointed by the Court. Since there is no exclusion of hearsay evidence in an affidavit of this kind, Herrington's statements on Gold's written reports are sufficient as a part of the affidavit, reading the affidavit as a whole.

VII.

PLAINTIFFS HAVE THE RIGHT AT ANY TIME TO AMEND THE PROOF OF FACTS SUBMITTED FOR AN ORDER OF PUBLICATION. THE DISTRICT COURT'S DENIAL OF APPELLANT'S MOTION TO AMEND WAS AN ABUSE OF DISCRETION.

Appellant's objections to this point (pp. 37-38 of her brief) lead us to only one conclusion, that appellee has an entire misconception of when jurisdiction of the Court attaches and the various steps in the procedure necessary to be done to make it attach. She apparently assumes that the Court's jurisdiction attaches the moment the order for publication is made, whereas it is clear that if the plaintiff upon obtaining an order for publication does nothing further by way of having the summons published, the Court never gets jurisdiction over the person of defendant. It is our contention that there are a number of steps necessary before the Court can even begin to assume jurisdiction. First, there must be a showing by affidavit or sheriff's return that the defendant cannot, after due diligence,

be found within the state. Second, there must be an order of publication. Third, there must be publication. Fourth, there must be proof of publication filed with the Court, and no jurisdiction attaches until all of the foregoing steps have been taken. Therefore, if the Courts, as shown by our citations, have permitted amendments of proof of publication, one of the steps involved in obtaining jurisdiction, to conform the proof to the facts, we can see no distinction in permitting the amendment and the filing of Gold's and Lavelle's affidavits to improve the proof of some of the facts as to diligence set forth in Herrington's affidavit, being another of the steps necessary to confer jurisdiction upon the Court.

We respectfully direct attention to that portion of appellee's brief on page 39, reading as follows:

“Not a single citation by appellants under this head had to do with an amendment as to matter going to the jurisdiction of the court over the person of the defendant, but, on the contrary, every case cited deals with *proceedings after jurisdiction has been obtained* and under circumstances which did not prejudice the defendants.” (Italics ours.)

wherein it appears that appellee's theory of jurisdiction is expressed and that, according to it, by some magic the jurisdiction of the Court attaches the moment the order for publication is granted, and anything and everything that takes place thereafter is of no moment and is amendable to show the actual facts.

We therefore submit that all our citations referring to cases where the service by publication was incor-

rect, as appeared from the proof, but was in fact correct, and where the proof was then amended, are in point. In all these cases it appeared from those documents that the necessary service was not made and this untrue picture was corrected by amending the proof. Thus, for instance, in the case of the *City of Salinas v. Lee*, supra (p. 26 of our Opening Brief), the affidavit of publication of service showed that the summons had not been published for the prescribed period, and so the proof showed that the Court had not obtained jurisdiction. The plaintiff was permitted to file amended proof and so show that in fact the requirements necessary for the Court to obtain jurisdiction had been present, and that only the proof of the elements for the obtaining of such jurisdiction had been incorrect.

We believe that it would unnecessarily increase the length of this brief in discussing each single case cited by us and commented on by appellee in her brief in applying this principle. Each of the cases which we cited is in point if it is read having in mind that the Court cannot obtain jurisdiction until the end of the whole proceedings for publication of service. We again refer to the case of *Thompson v. Thompson*, supra, where a number of cases are cited (L. ed. at p. 353) which all support the rule approved in the *Thompson* case that the jurisdiction of the Court is dependent on the question whether at the time when the order for publication was made the facts necessary for publication were present and that it is immaterial whether the proof of facts constituting the right of the Court to grant service by publication was deficient.

If only the proof was deficient under local law, then other proof might be furnished any time, if it shows the same facts which were alleged to be existent at the time of the order of publication in an affidavit which was defective as to the mode of proof. The same principal is enunciated in *Herman v. Santee*, 103 Cal. 519, at page 523, citing from Freeman on Judgments. We refer to the following cases which cover the exact situation, that amendment of proof has been permitted of a prior defective affidavit for publication of summons:

City National Bank v. Sparks (Okl.), 151 Pac. 225;

Chaplin v. First Bank of Hitchcock (Okl.), 181 Pac. 497;

Oliver v. Kelly (Okl.), 18 Pac. (2d) 1064.

VIII.

THE DISTRICT COURT'S EXERCISE OF ITS DISCRETION THAT HERRINGTON'S AFFIDAVIT PROVED THAT APPELLEE CONCEALED HERSELF TO AVOID SERVICE, CANNOT BE DISTURBED. APPELLEE IS ALSO BY THE FACT OF HER CONCEALMENT ESTOPPED TO RELY ON THE DEFENSE OF IMPROPER SERVICE.

The fact that the defendant-appellee concealed herself to avoid service cannot be proven as a matter of affiant's own knowledge. It lies in the nature of the subject to be proved that it is an inference to be drawn from information received and the futility of the attempts to locate defendant. Consequently, there is no way of proving such fact by an affidavit based on the

affiant's own knowledge. The affiant can do no better than to submit to the Court the essence of the information received and the efforts made, and affirm upon information and belief that defendant is concealing herself to avoid service. Such sworn statement, although of necessity based on information and belief, is a matter of great significance and it can subject the affiant to penalty for perjury. For good and complete proof the Court should know from the applicant whether he knows anything not disclosed to the Court which in his mind negatives the belief that defendant is concealing himself to avoid service. With a sworn statement on information and belief, made in addition to the statements on which his inferences are based, affiant goes on record that he knows nothing which negatives his expressed belief that defendant tries to avoid service. In the mouth of Herrington, as attorney-at-law, this meant that after two years of efforts to locate defendant, nothing had come to his personal knowledge which would interfere with his honest belief that defendant was hiding.

The clues that defendant was concealing herself, stated in Herrington's affidavit, were manifold:

(1) The marshal's official statement in writing that at the three addresses referred to in the affidavit, three different deputy marshals had made *several* attempts to serve appellee and that persons at these premises always advised that the defendant did not reside there or was away and refused further information concerning her whereabouts (Tr. p. 49);

(2) The marshal's official statement in writing that he attempted to serve appellee in another action for some Los Angeles attorneys (Tr. p. 49);

(3) The report of Gold as specially employed investigator that appellee and Kathryn Riddell, another defendant, whom the marshal had served with subpoena on December 11, 1936, at the Hermosa Beach address, were sister-in-laws (Tr. p. 49);

(4) The inference drawn from appellee's relationship to Kathryn Riddell that appellee had learned from Kathryn Riddell of the pendency of the suit and was anticipating that she would be served as a defendant therein (Tr. p. 49);

(5) The marshal's official statement in writing with regard to appellee's whereabouts, that he had "definitely established that she is residing at the address known as 119 Twenty-fourth Street, Hermosa Beach" (where Kathryn Riddell was served, Tr. pp. 40-41 and 50) and the marshal's further report that upon three different trips (two in the morning and one late at night) his deputy had been unable to serve process and that no one responded or answered the door (Tr. p. 50);

(6) Gold's written statements as process-server appointed by the Court:

(a) That inquiries made at Hermosa Beach indicated that Kathryn Riddell and appellee were then residing, temporarily at least, at appellee's Hollywood address, and that upon his calling

there on March 31, 1937, he was unable to get an answer to his ringing the doorbell although lights were burning inside the house (Tr. p. 52) ;

(b) That a woman at the Hermosa Beach address had informed him that she was renting the place as a tenant from appellee (Tr. p. 52) ;

(c) That he had talked with a member of the law firm which had presented appellee in a Superior Court action, and was advised that the attorneys had not seen or heard from appellee since that action was dismissed and that the last address they had was appellee's Burbank address (Tr. p. 53) and that the telephone number at that address was a confidential unlisted number (Tr. p. 53) ;

(d) That the tax collector's office had advised Gold that the tax bills on the Hermosa Beach property and on the property which was appellee's Burbank address were sent upon her direction to Kathryn Riddell although the properties were recorded in the name of an Elizabeth Gordon ;

(7) Independent written information received by affiant from the law firm of Meserve, Mumper, Hughes and Robertson of Los Angeles, that they in another action had made numerous unsuccessful attempts to effect service on appellee at the Hermosa Beach and Burbank addresses, and that neither the marshal nor their own office clerks could locate appellee, which information proved to be still true more than one-half a year thereafter when the attorneys informed Gold on this fact. (Tr. p. 56.)

It seems to us when the judge of the District Court, from an affidavit stating all this and other additional information, and from the marshal's returns, was satisfied that appellee (who in her own affidavit in support of motion does not deny that she was aware of the pendency of the suit) concealed herself to avoid service, that this is a matter of his discretion which could not be disturbed even on appeal but which by no means can be discussed and reviewed in a collateral proceeding such as this.

Concealing one's self to avoid service is under Sec. 412 of the California Code of Civil Procedure, a separate ground for an order of publication of service, so that if the discretion of the District Court cannot be disturbed in this respect this fact alone would be sufficient to uphold the judgment.

However, we refer to the cases cited on pages 39-40 of our opening brief for the rule that a person who has concealed himself to avoid service is estopped at any later time to come from his hiding place into the open and to attack the judgment for defects in the service of process. The answer which the law gives to such attack on the judgment is to the effect that if the defendant had not concealed himself personal service could have been made, and that therefore defects in the substituted service cannot be taken advantage of by him.

The fact of concealment is the essential point to work out this estoppel so that even if Herrington's affidavit were insufficient, Gold's and Lavelle's affidavit could be used not merely as amendments of the proof

of the requirements for substituted service but also as additional proof that appellee concealed herself and avoided service.

IX.

APPELLEE BY MAKING HER MOTION TO DISMISS, BY PLEADING MATTERS CONCERNING THE MERITS OF THE CASE AND THE COURT'S JURISDICTION OF THE SUBJECT MATTER, VOLUNTARILY SUBMITTED HER PERSON TO THE JURISDICTION OF THE DISTRICT COURT AND WAIVED THE RIGHT TO RELY ON THE DEFENSE OF IMPROPER SERVICE.

Appellee, in her motion, asked the Court to quash service and dismiss the action. The Court thereupon vacated the judgment and made an order that appellee should file an answer (which answer has been filed by appellee) which recognized the fact that appellee had appeared generally and was within the jurisdiction of the Court.

It seems inconsistent to claim that the Court has not acquired jurisdiction of the appellee's person and that therefore the judgment is void, but that at the same time the appellee is before the Court in the same action and must answer the complaint.

Rule 12(b) of the Rules of Civil Procedure can be construed only in conformity with the fact that a person who pleads is before the Court.

It was held in the case of *Carcelli v. Order of United Commercial Travelers of America* (D.C. Pa., 1042), 47 F. Supp. 433, that defendant by appearing generally in the State Court for the purpose of having

the action removed to the Federal Court, waived the insufficiency of service of summons and could not thereafter question such service in the Federal Court.

The case of *Puett Electrical Starting Gate Corp. v. Thistle Dawn Co.* (D.C. Ohio, 1942), 2 Fed. Rules Dec. 550, is to the effect that applying for leave to answer is a submission to the jurisdiction of the Court, while applying for leave to object to the jurisdiction or to amend the pleading which attacks the jurisdiction is not a general appearance and does not waive the right to question the Court's jurisdiction.

In the case of *Hale v. Campbell* (N.D. Iowa, 1941), 40 F. Supp. 584, reversed on other grounds (127 F. (2d) 594), it was held that a motion to dismiss for want of jurisdiction and for other defenses, purporting to be filed under a special appearance, was to be construed as based on defensive matters which could not be determined without exercising jurisdiction, and hence amounted to a general appearance.

It has also been held in the case of *Grant v. Kellogg Co.* (1943) (7 Fed. Rules Serv. 12(b) 23 case 1), that in an action commenced in a State Court and in which attachment has been levied against assets of the defendant within the State, the defendant may not after removal to the Federal Court make a special appearance limited to defending its interests in the attached fund, but that any appearance will constitute a submission to the jurisdiction of the Court.

As these decisions show Rule 12(b) of the Rules of Civil Procedure does not eliminate the fundamental rule that the fact of pleading to the merits and to

jurisdiction as to the subject matter negatives the defense of lack of jurisdiction over the person. A defendant who asks the Court to dismiss the action, and files an answer, cannot with the same breath claim that he is not before the Court.

In the case of *Security etc. Co. v. Boston etc. Co.*, 126 Cal. 419, at page 422, it was held that if a motion is made to set aside a judgment "on a ground inconsistent with the claim that it is void for want of jurisdiction of the person * * * it constitutes a submission on their (defendants') part to the jurisdiction of the Court, because the relief granted would be inconsistent with any other reasonable hypothesis". (Parentheses ours.) See also

Raps v. Raps, 20 Cal. (2d) 382.

We submit that Rule 12(b) as construed by the Courts does not defeat a rule which is a necessary outgrowth of legal logic.

Appellee has based her motion among other things on the pleas of lack of the jurisdictional amount which goes to jurisdiction of the subject matter and the statute of limitations which goes to the merits.

CONCLUSION.

We conclude that whether or not Herrington's affidavit and the other proof before the District Court was sufficient to satisfy the Court as to the fact that appellee after diligent search could not be found within the State and/or that she was concealing her-

self to avoid service was a matter within the Court's discretion including the point to which degree the Court was satisfied by statements made on hearsay, which discretion of the Court cannot be disturbed in this collateral proceeding; that Herrington's affidavit was not defective under California law; that defects in the affidavit as to the mode of proof would not suffice to make the judgment based on the substituted service void and *coram non judice*; that the marshal's return is proper proof for an order of publication; that the recital of due service in the judgment is conclusive upon collateral attack; that the affidavits of Gold and Lavelle were admissible as amended proof of the facts stated in Herrington's affidavit; that concealment to avoid service must needs be proved by an affidavit made upon information and belief, and that a defendant who concealed himself is estopped to rely on the defense of improper service of process; that appellee in making a motion conceding jurisdiction of the subject matter and the merits of the case submitted her person to the jurisdiction of the Court. We therefore respectfully submit that the order of the District Court appealed from should be reversed.

Dated, San Francisco,
July 26, 1943.

DINKELSPIEL & DINKELSPIEL,
Attorneys for Appellants.

No. 10,381

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

JAMES W. BUTLER, et al.,

Appellants,

VS.

GRACE APPLETON McKEY,

Appellee.

**APPELLEE'S CLOSING BRIEF
IN SUPPORT OF PETITION FOR REHEARING.**

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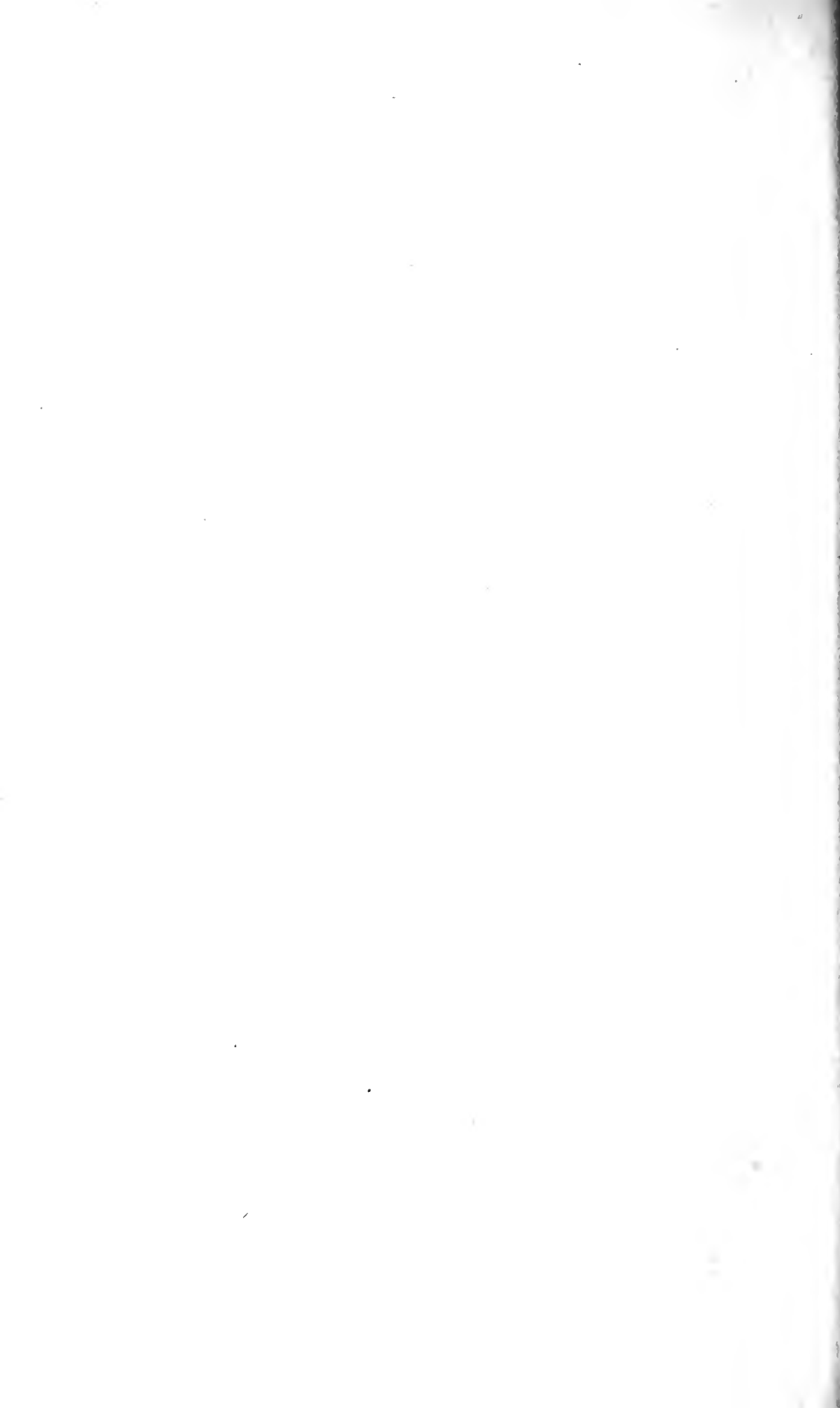
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FILED

OCT 27 1943

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No. 10381

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APPELLEE'S CLOSING BRIEF
IN SUPPORT OF PETITION FOR REHEARING.

*To the Honorable Curtis D. Wilbur, Presiding Judge,
and to the Associate Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:*

In view of the fact that appellants, in their reply to appellee's petition for rehearing, have in some places therein incorrectly interpreted decisions, and in other places understated facts in other decisions, we believe that a short closing brief on behalf of appellee may be of some assistance to the Court in passing upon the petition.

I.

ANSWER TO APPELLANTS' POINT I, THAT: "THIS COURT DID NOT HOLD THAT CALIFORNIA LAW RATHER THAN FEDERAL LAW GOVERNS THE QUESTION WHETHER DEFECTS IN THE MODE OF PROOF RELATING TO THE PUBLICATION OF SUMMONS RENDERS A FEDERAL JUDGMENT VOID."

This Court in its opinion did very definitely call attention to the fact that the California law applied when determining whether or not there was a valid service of process upon a defendant in this state.

Appellants, lacking confidence in their argument as to the California Courts' interpretations of Section 412 of the California Code of Civil Procedure, seek to have this Court disregard the California cases cited by appellee, and accept decisions of Federal Courts interpreting laws of other states as determinative thereof. And to do this, they argue that the question of whether or not the judgment is void is a Federal question rather than one for interpretation by state Courts. In this argument they ignore entirely the fact that in any Court, a judgment is void for lack of jurisdiction if there has been no service upon the defendant. And since, as this Court admits that under the rule, the service upon a defendant in a Federal Court must be made in accordance with the requirements of the state law, if under the state statute, as interpreted by the Courts of the State, a legal service has not been had, Courts Federal or State must adopt the conclusion that the judgment predicated upon such an invalid service is void.

On page 3 of their reply to the petition for rehearing, appellants cite *Thompson v. Thompson*, 226 U.S.

555-556 to the effect that that Court there held that, even if the Virginia law which was there being interpreted declared a published service, based upon an affidavit made wholly upon information and belief, was insufficient, the judgment would not be a nullity. The Supreme Court in that case reached no such conclusion. The first thing the Court did in that case was to search the laws of Virginia to see whether an information and belief affidavit was a sufficient base for an order for publication of summons in that State. Finding none, the Court determined that the affidavit was sufficient. Appellants' counsel say with reference to the *Thompson* decision that:

“The court said that even if the Virginia law did not sanction such affidavit, the judgment would not be a nullity.”

What the Court did say, after reciting that it had been unable to find any Virginia code provisions or decisions that prohibited the use of information and belief affidavit, was:

“In the very decree before us the Virginia court has adjudged such an affidavit to be sufficient. We are therefore bound to assume that the use of such an affidavit is in accord with proper practice in that state.”

Then the Court went on to say “But were it otherwise” (meaning, of course, that if the Virginia Court had not adjudged the affidavit sufficient) it seemed well settled that the fact that the affidavit was defective “not in omitting the stating of material fact, but in the mode of stating it” did not render the

judgment void on its face. The Court then cites a Nebraska case, two Michigan cases, a Kansas case and a New York case, and the Ency. of Pleading and Practice, and *no* Federal decision. And the Court finally says:

“In the absence of any local law excluding the use of such an affidavit, the decision of the state court, accepting it as legal evidence, must be deemed sufficient on collateral attack, to confer jurisdiction in that court over the subject matter, in accordance with local laws.”

So what that Court held was that the judgment in that case was not subject to collateral attack “in the absence of any local law excluding the use of such an affidavit.” The California decisions cited by us in our petition for rehearing disclose that the local law of California *does exclude* the use of such an affidavit.

On page 3 of appellants’ reply, the case of *Pennoyer v. Neff*, 95 U. S. 714, is cited to the effect that there the Supreme Court overruled a trial Court which held that the affidavit for publication of summons was defective. It will be observed that the synopsis of the argument of both parties in that case (which precedes the opinion in the report) makes no mention of the claimed *defects* relied upon by the defendant in error in that case, and the decision itself fails to mention what defects were complained of, and there is nothing at all to indicate what the Oregon law was as to the proposition. Hence, that case is not authority for the proposition that Federal Courts will not recognize decisions of State Courts, holding service, made under

the laws of respective Courts, to be void because of failure to comply with the State statutes.

Appellants' citations of *Marx v. Ebner*, 108 U. S. 314 (Appellants' Reply, page 3), and *Cohen v. Portland Lodge*, 152 Fed. 357 (cited on page 4 of the reply) are of no assistance. We discuss them later herein, in answer to appellants' point VI.

II and III.

APPELLANTS' POINTS II AND III COMPRISE AN ANALYSIS OF POINTS RAISED BY US ON THE PETITION FOR A RE-HEARING AND A DISCUSSION OF THE CASES CITED BY US. THERE IS NOTHING SAID BY APPELLANTS UNDER THOSE HEADINGS WHICH REQUIRES FURTHER DISCUSSION BY US.

IV.

ANSWER TO APPELLANTS' POINT IV, THAT: "THE JUDGMENT IS NOT VOID FOR THE REASONS CONTENDED BY PETITIONER THAT APPELLANTS FAILED TO ESTABLISH BY AFFIDAVIT THAT NO CERTIFICATE OF RESIDENCE WAS FILED BY APPELLEE IN SAN FRANCISCO." (Appellants' Reply, p. 13.)

Appellants start out their argument with the statement that they had in vain searched appellee's brief in order to find an allegation that such certificate had been filed.

The *jurisdiction* of the Court, when ordering publication of summons, depends upon the sufficiency of the showing for the order. No action of the plaintiff

or statement of the defendant, *after the order was made*, can affect that jurisdiction one iota.

Next counsel argue that whether “the facts necessary for a publication of summons were present” is the first concern of the Court, and if the facts were present the judgment is safe from a collateral attack. That is rather a strange statement—in other words if the facts were present and no affidavit were filed, the Court would still have jurisdiction.

In support of this strange proposition appellants cite *Thompson v. Thompson* (supra), which as we have shown, supports no such theory.

Appellants also cite the California cases of *Herman v. Santee*, 103 Cal. 519; *City of Salinas v. Luke Kow Lee*, 217 Cal. 252 and *Kaufman v. Mining Syndicate*, 16 Cal. (2d) 90, to the same point. The two first cited cases have to do with *affidavits of publication*, which is an entirely different thing. The *jurisdiction* of the Court to order publication is dependent upon the *showing* made under the statute. The jurisdiction to render judgment following default is dependent upon whether service was in fact made as ordered—consequently if an affidavit to establish the fact of publication—is defective and does not state the facts it may be corrected. We discuss those cases in our “Brief for Appellee” pp. 39 and 40. *Kaufman v. California Mining Syndicate*, was discussed by us in our “Brief for Appellee”, p. 43.

Appellants’ next effort to avoid the point that the affidavit, as to the lack of a certificate of residence, was insufficient because based upon information and

belief, is to cite the case of *Davis v. Ramont*, 66 Cal. App. 778, and *City of Salinas v. Lee* (supra). In each of those cases the order of publication was based upon an affidavit setting out that the defendant was a non-resident, and the Court held that where the defendant was a non-resident it was not necessary to prove that no certificate of residence was on file in the state. The reason for this, of course, is obvious.

To make those cases appropriate to the matter now before the Court, appellants proceed to distinguish between an order for publication of summons on the basis that the defendant after due diligence cannot be found within the state; and one predicated upon the fact that the defendant conceals himself to avoid service. It seems to us perfectly obvious that if a person conceals himself to avoid service and is successful in that venture, then he cannot after due diligence be found within the state; and that therefore and under Section 412, the affidavit before giving the Court jurisdiction, for an order of publication, has to disclose whether or not the certificate of residence provided for by Section 1102 of the Civil Code has been filed for record.

Appellants next argue that petitioner appellee failed to state in her petition "any authority or reason why hearsay statements in an affidavit of this type concerning the filing of a certificate of residence should have other effect upon the judgment upon collateral attack than another hearsay statement in the same affidavit."

Under authorities we have heretofore cited, there is not any distinction, because an affidavit based upon hearsay is not proof by affidavit as required by the code section. However, there is this to say about it: that with reference to this part of the affidavit, appellants' counsel cannot argue that anywhere else in the affidavit the affiant has alleged positively and directly that no certificate of residence was on file. Of course, the answer to the present point is that under the law of California, an affidavit purporting to state upon information and belief what appears or does not appear in a public record is no evidence at all.

We do not consider appellants' final argument upon this point, to the effect that no one could state definitely in the negative with reference to the record worthy of serious considerations. That is rather a strange argument in view of the fact that all county records are indexed in accordance with legal requirements, and anybody can examine the index and determine definitely whether or not a particular document is indexed. Of course, the answer is very obvious: although appellants seek a judgment of more than \$100,000 by virtue of the default judgment, counsel making the affidavit did not consider it worth while to go to the Court House and search the records himself.

Finally, and on page 18 of the reply, appellants' counsel argue that petitioner appellee is "estopped from amending her motion by now urging a new ground for the alleged nullity of the judgment, since

appellants cannot now amend their proof as to the fact that a certificate of residence was never filed.” There are two answers to this argument. In the first place appellee does not have to amend her motion to raise this point because it is included in the following ground set forth in appellee’s motion, which is found on page 70 of the record:

“(b) That the order of this court directing publication of summons against this moving defendant does not comply with Section 412 of the Code of Civil Procedure of the State of California, in that the alleged facts in the affidavit of Fred S. Herrington upon which the order is based, are predicated not upon the affiant’s knowledge but upon hearsay.”

Furthermore, as we stated in our petition for rehearing, an order or judgment, void upon its face, may be attacked at any time. (See Appellee’s Brief, pp. 20-25.) Since the trial Court may set it aside at any time, no motion is necessary to bring about that result. As the Court said in *Michel v. Williams*, 13 Cal. (2d) 198, “the Court has power to vacate an order, void upon its face, at any time upon its own motion or upon motion of a party.”

ANSWER TO APPELLANTS’ POINT V, THAT: “THE PETITIONER DOES NOT ATTACK THE JUDGMENT INSOFAR AS THE PUBLICATION WAS BASED ON THE FACT THAT THE PETITIONER WAS CONCEALING HERSELF TO AVOID SERVICE.” (Appellants’ Reply, p. 19.)

Appellants dignified this point of their reply by one sentence. We answer it by merely stating that

in Herrington's affidavit the hearsay facts set out therein dealt indiscriminately with the charge of concealment and the allegations that appellee could not after diligent search be found within the State of California. In other words, since the attack upon the affidavit is upon the ground of hearsay, the authorities cited by us which establish that a hearsay affidavit is insufficient, apply as well to an affidavit charging concealment as one alleging the plaintiff's inability to discover defendant's whereabouts after diligent search.

ANSWER TO APPELLANTS' POINT VI, THAT: "THE MARSHAL'S CERTIFICATE IS ADMISSIBLE EVIDENCE FOR AN ORDER OF PUBLICATION." (Appellants' Reply, p. 19.)

Under this head appellants' counsel say that "There was no particular reason for the Court to enter into a discussion of *the California practice* on the point, beyond its reference to the Federal cases of *Marx v. Ebner*, 180 U. S. 314, and *Cohen v. Portland Lodge*, 152 Fed. 357" (emphasis ours). Since California practice as to the service of summons governs the Court's action in this case and the California Courts have spoken, we cannot see how this Court's interpretation of Oregon law in *Cohen v. Portland Lodge* and the United States Supreme Court's application of the law as it applied to the District of Alaska in *Marx v. Ebner* can be considered as an interpretation of California law.

It is true that this Court in the *Cohen* case held a sheriff's return to be some evidence under Oregon

law. But in that case the affiant himself made a diligent search, including inquiry from the executors of the last will of the defendants' father and was advised that the defendants (minors) were in the Pacific Orphan Asylum of San Francisco. (See 152 Fed. 361.) And in holding that the return of the officer could be considered, it did so on the authority of *Marx v. Ebner* (supra). However, in the *Marx* case, the affidavit contained the positive averment that the defendant resided in another state, and the Court held that the return might be considered with the facts stated in the affidavit, *provided the other facts sworn to are sufficient*. (See end of opinion, 180 U. S. at 320.)

Since as this Court conceded in its opinion, California law determines, how can such cases of foreign jurisdictions override the decisions of the Courts of California that when the statute says "affidavit", it does not include an unsworn statement of anybody? When the Supreme Court of California said in *Rue v. Quinn*, 137 Cal. 651 at 655, that "if either of the facts (including that defendant cannot after due diligence be found within the state) does not *appear by affidavit*, the Court or judge has no jurisdiction to make the order and the order made thereon will be insufficient to sustain a judgment," it certainly was not recognizing a sheriff's or marshal's return as a substitute for an affidavit.

Appellants' counsel refer to California cases cited on pages 24 et seq. of their "Reply Brief for Appellants". On those pages they quote from *Rue v. Quinn* (supra) that: "the sheriff's return may be relied upon as a part of the evidence that the de-

fendant cannot be found within the county.” That statement was not directed at all to the question of the sufficiency of the affidavit, but rather to the point, therein raised, that the Court lost the power to order service by publication by the fact that the summons had been previously returned to the office of the clerk. (137 Cal. 657.) The above quoted language from the decision was to establish that service had not been made and it was therefore proper to have a new summons issued.

In *Clarkin v. Morris*, 178 Cal. 102, cited by appellant on page 26 of said reply brief, the Court in describing the affidavit recites the fact that the affidavit referred to the return of the summons, but nowhere in that decision does the Court pass upon the question of whether a return can take the place of an affidavit. The affidavit in that case described the investigation of the *affiant*, including his inquiry of persons who not only were acquainted with the defendant sought to be served, but had acted as bondsmen for her.

In *Weiss v. Cain*, 73 Pac. 980, the affidavit was substantially the same as in *Rue v. Quinn* and the Court upheld the affidavit upon the authority of *Rue v. Quinn*; and it will be recalled that the affidavit in the latter case recited the search made by the *affiant*, and not by someone else, as does the affidavit in the case at bar.

Appellants' handling of the case of *Ligare v. California S. R. R. Co.*, 76 Cal. 610, well illustrates the lack of confidence of appellant's counsel in the point.

They state with reference to that case, that “diligence was proven by an affidavit that the summons and alias-summons had been placed in the hands of the sheriff of a certain county, and thereafter in the hands of other sheriffs, with instructions to make service, but that they had all returned the summonses with endorsed returns thereon or written responses that they had made diligent enquiries and search within their counties and could not find any of the defendants.” (Appellants’ Reply Brief, p. 25.)

A reading of the decision (76 Cal. at 612) will reveal that the affidavit at the outset described a search *made by the affiant* by an “inquiry of all persons from whom he (affiant) could expect to obtain information as to the residence of said defendants”; that the decision by italics emphasized that part of the affidavit, and that nowhere in the case was there involved the competency of hearsay statements in the affidavit, or of the right of the Court to consider on the motion, the returns of the sheriff or marshal.

On page 44 of “Brief for Appellee” we cited *Grigsby v. Wopschall*, 127 N. W. 605, in which the claim that the sheriff’s return was evidence in support of the order of publication, was directly presented, and on which the Court held that the return of the sheriff was not evidence because it was not an “affidavit”.

POINT VII OF APPELLANTS' REPLY REQUIRES NO COMMENT,
AS IT IS MERELY ARGUMENT.

CONCLUSION.

In conclusion we respectfully submit that under the code section and the California decisions interpreting it, the judgment of the trial Court is entitled to an affirmance at the hands of this Court.

Dated, San Francisco,
October 26, 1943.

SULLIVAN, ROCHE, JOHNSON & FARRAHER,
THEO. J. ROCHE,
HIRAM W. JOHNSON,
THEODORE H. ROCHE,
GEORGE A. STOCKFLETH,
JAMES FARRAHER,

Attorneys for Appellee.

United States
Circuit Court of Appeals
For the Ninth Circuit.

BANK OF AMERICA, NATIONAL TRUST
AND SAVINGS ASSOCIATION, a national
banking association,

Appellant,

vs.

CLIFFORD C. ANGLIM, United States Collector
of Internal Revenue for the First Collection
District for California,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

APR 10 1943



United States
Circuit Court of Appeals

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BANK OF AMERICA, NATIONAL TRUST
AND SAVINGS ASSOCIATION, a national
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Appellant,

vs.

CLIFFORD C. ANGLIM, United States Collector
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Assistant U. S. Attorney,

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San Francisco, California.

In the District Court of the United States in and
for the Northern District of California, South-
ern Division

No. 22219S

BANK OF AMERICA NATIONAL TRUST
AND SAVINGS ASSOCIATION, a national
banking association,

Plaintiff,

vs.

CLIFFORD C. ANGLIM, United States Collector
of Internal Revenue for the First Collection
District of California,

Defendant.

COMPLAINT FOR THE RECOVERY OF INCOME TAXES

Comes Now the plaintiff, complains of the de-
fendant, and for cause of action alleges:

I.

This action arises under the Internal Revenue
Laws [1*] of the United States; it is brought pursu-
ant to the provisions of Section 24 of the Judicial
Code, U.S.C. Title 28, Sec. 41(5), for the recovery of
income tax erroneously and illegally collected from
the plaintiff as withholding agent under Section
143 of the Internal Revenue Code, as hereinafter
more fully appears.

* Page numbering appearing at foot of page of original certified
Transcript of Record.

II.

The plaintiff is a national banking association organized and existing under and by virtue of the laws of the United States of America. Its principal place of business is in the City and County of San Francisco, State of California, and in the Northern District of California, Southern Division.

III.

The defendant is now, and at all times since the 7th day of March 1938 has been, the duly appointed, qualified and acting United States Collector of Internal Revenue for the First Internal Revenue Collection District of the State of California, and is a resident of the said Northern District of California.

IV.

At all times herein mentioned plaintiff was the transfer agent of Transamerica Corporation and as such transfer agent had the control, custody, disposal or payment of dividends declared by said Transamerica Corporation, to the stockholders of said corporation.

V.

On or about March 15, 1939, the plaintiff filed a withholding tax return on Treasury Department Form 1042 [2] reporting thereon certain income including dividends paid by Transamerica Corporation on the capital stock of said corporation, payable to alien individuals who were not residents of the United States. Plaintiff also reported on this Form the amount of tax which it was withholding

from said non-resident alien individuals, and the aggregate amount of said tax was paid by the plaintiff on or about June 15, 1939 to the defendant as Collector of Internal Revenue for the First District of California.

VI.

The amount of the said tax deducted and withheld from the said non-resident alien individuals, and reported on said return form 1042, and paid to the defendant, all as alleged in the preceding paragraph hereof, included \$3,189.83 of tax computed upon and withheld from the dividends declared by Transamerica Corporation in 1938 and payable in said year 1938, to said non-resident alien individuals who were stockholders of said company. The amount of said dividends were deposited by Transamerica Corporation with the plaintiff as its transfer agent charged with the duty of making disbursement of said dividends to the stockholders entitled thereto, and the plaintiff assumed that the tax of \$3,189.83 which it withheld, reported, and paid to the defendant as aforesaid, was a tax required to be so deducted withheld and paid by the provisions of said Section 143(b) and (c) of the Internal Revenue Code.

VII.

After the payment of the withheld tax of \$3,189.83 [3] as hereinbefore alleged and on or about January 31, 1941, the Commissioner of Internal Revenue determined and ruled that the dividends paid by Transamerica Corporation in the year 1938 did

not constitute dividend income to its stockholders. Thereupon plaintiff made a notation of credit to the account of the stockholders from whom the said tax of \$3,189.83 was withheld indicating a credit to which each of said persons is entitled by reason of the erroneous deduction of said tax.

VIII.

Section 143(b) of the Internal Revenue Code requires the withholding of tax only upon items which constitute income. Since the said Transamerica Corporation dividends did not constitute income, no withholding of tax thereon was required, and the defendant acted unlawfully in collecting from plaintiff the amount of said tax of \$3,189.83 shown in plaintiff's said return form 1042, as having withheld upon said dividends.

IX.

On or about July 26, 1941 the plaintiff duly filed its claim for refund of said tax of \$3,189.83. Said claim was made and filed in accordance with the provisions of the law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, and alleged as the bases for said claim the same grounds and facts hereinbefore alleged and herein relied upon. Copy of said claim (exclusive of the voluminous schedules which were attached thereto) is attached hereto as Exhibit A and hereby made a part hereof. On November 25, 1941 the Deputy Commissioner of Internal Revenue advised the plaintiff by letter that its claim for

refund would be rejected. Copy of said letter of November 25, 1941 is attached hereto as Exhibit B and hereby made a part hereof. On December 17, 1941 the Commissioner of Internal Revenue notified the plaintiff that the said claim for refund was rejected in full. Copy of said notice of rejection is attached hereto as Exhibit C and hereby made a part hereof.

X.

No part of said sum of \$3,189.83 erroneously [4] and illegally collected from the plaintiff by defendant as aforesaid has been repaid or refunded, and said sum of \$3,189.85 together with interest thereon as provided by law is due, unpaid, and owing to the plaintiff from the defendant.

SECOND CAUSE OF ACTION

For another, further, and second cause of action herein, plaintiff alleges:

I.

Plaintiff realleges all of paragraphs I, II, III and IV of the First Cause of Action herein and makes the same a part of this Second Cause of Action, the same as if fully set forth herein.

II.

On or about March 15, 1940, the plaintiff filed a withholding tax return on Treasury Department Form 1042 reporting thereon certain income including dividends paid by Transamerica Corporation on the capital stock of said corporation, payable to

alien individuals who were not residents of the United States. Plaintiff also reported on this Form the amount of tax which it was withholding from said non-resident alien individuals, and the aggregate amount of said tax was paid by the plaintiff on or about June 15, 1940 to the defendant as Collector of Internal Revenue for the First District of California.

III.

The amount of the said tax deducted and withheld from the said non-resident alien individuals, and reported on said return form 1042, and paid to the defen- [5] dant, all as alleged in the preceding paragraph hereof, included \$3,227.46 of tax computed upon and withheld from the dividends declared by Transamerica Corporation in 1939 and payable in said year 1939, to said non-resident alien individuals who were stockholders of said company. The amount of said dividends were deposited by Transamerica Corporation with the plaintiff as its transfer agent charged with the duty of making disbursement of said dividends to the stockholders entitled thereto, and the plaintiff assumed that the tax of \$3,227.46 which it withheld, reported, and paid to the defendant as aforesaid, was a tax required to be so deducted, withheld, and paid by the provisions of said Section 143(b) and (c) of the Internal Revenue Code.

IV.

After the payment of the withheld tax of \$3,277.46 as hereinbefore alleged and on or about Jan-

uary 31, 1941, the Commissioner of Internal Revenue determined and ruled that the dividends paid by Transamerica Corporation in the year 1939 did not constitute dividend income to its stockholders. Thereupon plaintiff made a notation of credit to the account of the stockholders from whom the said tax of \$3,227.46 was withheld indicating a credit to which each of said persons is entitled by reason of the erroneous deduction of said tax.

V.

Section 143(b) of the Internal Revenue Code requires the withholding of tax only upon items which constitute income. Since the said Transamerica Corporation dividends did not constitute income, no withholding of tax thereon was required, and the defendant acted un- [6] lawfully in collecting from plaintiff the amount of said tax of \$3,227.46 shown in plaintiff's said return form 1042, as having been withheld upon said dividends.

VI.

On or about July 26, 1941 the plaintiff duly filed its claim for refund of said tax of \$3,227.46. Said claim was made and filed in accordance with the provisions of the law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, and alleged as the bases for said claim the same grounds and facts hereinbefore alleged and herein relied upon. Copy of said claim (exclusive of the voluminous schedules which were attached thereto) is attached hereto as Exhibit D

and hereby made a part hereof. On November 25, 1941 the Deputy Commissioner of Internal Revenue advised the plaintiff by letter that its claim for refund would be rejected. Copy of said letter of November 25, 1941 is attached hereto as Exhibit B and hereby made a part hereof. On December 17, 1941 the Commissioner of Internal Revenue notified the plaintiff that the said claim for refund was rejected in full. Copy of said notice of rejection is attached hereto as Exhibit C and hereby made a part hereof.

THIRD CAUSE OF ACTION

For another, further, and third cause of action herein, plaintiff alleges:

I.

Plaintiff realleges all of paragraphs I, II and III of the First Cause of Action herein and paragraph II of the Second cause of Action herein, and makes the same a part of this Third Cause of Action the same as though fully set forth herein.

II.

During the year 1939 plaintiff was custodian for the account of one Hugo Menkes of 125 Chaussee D'Annars, Brussels, Belgium. In the year 1939

plaintiff received for credit to said account, amounts as follows: [7]

Interest on savings bank account.....	\$302.26
Interest on \$3,000 Treasury bonds, 2 7/8, '55/60	114.99
	<hr/>
Total	\$417.25
Other interest	207.13
	<hr/>
Total	<u>\$624.38</u>

Hugo Menkes is a non-resident alien within the meaning of Section 143 of the Internal Revenue Code.

III.

The amount of the said tax deducted and withheld from the said non-resident alien individuals and reported on said return form 1042 and paid to the defendant, all as alleged in paragraph II of the Second Cause of Action herein, included \$62.44 computed upon and withheld from the income credited to the account of Hugo Menkes as alleged in the preceding paragraph hereof.

The said \$62.44 tax withheld as aforesaid included \$41.73 of tax withheld on interest on the savings account and on interest on the Treasury bond, which interest was credited to the account of Hugo Menkes as alleged in the preceding paragraph hereof. The said interest on the savings account and the said interest on the treasury bonds does not constitute income upon which tax is required to be withheld under the provisions of Section 143 of the Internal Revenue Code, and the plaintiff errone-

ously paid the tax withheld on these items to the defendant and the defendant erroneously and illegally collected the same from the plaintiff.

Upon discovery of the error in withholding this said amount of \$41.73, the plaintiff credited back to the account of Hugo Menkes, the said amount of \$41.73.

IV.

On April 14, 1941, the plaintiff duly filed with [8] the defendant its claim for refund of said tax of \$41.73. Said claim was made and filed in accordance with the provisions of the law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof and alleged as the bases for said claim the same grounds and facts hereinbefore alleged and herein relied upon. A copy of said claim for refund is hereto attached marked Exhibit E. On November 25, 1941, the Deputy Commissioner of Internal Revenue advised the plaintiff by letter that its claim for refund would be rejected. Copy of said letter of November 25, 1941, is attached hereto as Exhibit B and hereby made a part hereof. On December 17, 1941, the Commissioner of Internal Revenue notified the plaintiff that the said claim for refund was rejected in full. Copy of said notice of rejection is attached hereto as Exhibit C and hereby made a part hereof.

V.

No part of said sum of \$41.73 erroneously overpaid by plaintiff and erroneously and illegally collected from the plaintiff by the defendant as afore-

said, has been repaid or refunded and said sum of \$41.73 together with interest thereon as provided by law, is due, unpaid, and owing from the defendant.

Wherefore, the plaintiff prays that it have and recover of and from the defendant the sum of \$6,-459.02 together with interest thereon as provided by law, and costs of suit herein, and for such other and further relief as the Court may deem just and proper in the premises.

GEORGE H. KOSTER

Attorney for Plaintiff

300 Montgomery Street

San Francisco, California

(Duly Verified.) [9]

EXHIBIT A

CLAIM

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

Collector's Stamp

(Date received)

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

[x] Refund of Tax Illegally Collected.

[] Refund of Amount Paid for Stamps Unused,
or Used in Error or Excess.

[] Abatement of Tax Assessed (not applicable
to estate or income taxes).

State of California

County of San Francisco—ss:

(Type or Print)

Name of taxpayer or purchaser of stamps—Bank of America N. T. & S. A. "Withholding Agent".

Business address—1 Powell Street, San Francisco, California.

Residence—

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—1st of California at San Francisco.
2. Period (if for income tax, make separate form for each taxable year) from January 1, 1938, to December 31, 1938.
3. Character of assessment or tax—Income tax.
4. Amount of assessment, \$10,061.56; dates of payment June 13, 1939.
5. Date stamps were purchased from the government—
6. Amount to be refunded—\$3,189.83.
7. Amount to be abated (not applicable to income or estate taxes)—
8. The time within which this claim may be legally filed expires, under Section 322 of the Revenue Act of 1938, as amended, on March 15, 1942.

The deponent verily believes that this claim should be allowed for the following reasons:

Return of tax withheld for taxable year 1938 (Form 1042), filed on or about March 15, 1939, included tax on dividends paid by Transamerica Corporation in January and July, 1938, per list attached, amounting to \$3,189.83. Said dividends have since been ruled by Treasury Department to be a return of capital and not taxable. In accordance with said ruling the tax erroneously withheld has been credited back to the accounts of the stockholders and demand for refund is hereby respectfully requested.

(Attach letter-size sheets if space is not sufficient)

Signed R. G. SMITH

Exec. Vice President

Sworn to and subscribed before me this 24th day of July, 1941.

VIRGINIA A. BEEDE,

Notary Public

[Printers Note]: Reverse side ruled form not filled out.] [11]

EXHIBIT B

Treasury Department
Washington

Nov. 25, 1941

Office of
Commissioner of Internal Revenue
Address reply to
Commissioner of Internal Revenue
and refer to

IT:Rec:IW :2

EB-2639729

2639728

2635471

Bank of America, National Trust and Savings
Association,
1 Powell Street
San Francisco, California.

Sirs:

Reference is made to the claim filed by you for the refunding of \$3,189.83, a portion of the tax assessed against you on your 1938 withholding return, Form 1042, serial number 500170, which return includes dividends on your stock and on stock of the Transamerica Corporation. Further reference is made to the claims filed by you for the refunding of \$3,227.46 and \$41.73, portions of the tax assessed against you on your return Form 1042, serial number 500131, for the year 1939 which return also reports dividends on stock of your corporation and on stock of the Transamerica Corporation.

The basis of each of the claims for the refunding of \$3,189.83 and \$3,227.46 is that tax was erroneously withheld from dividends on stock of the Transamerica Corporation paid to numerous non-resident foreign persons as the Bureau has determined that the dividends are 100 percent nontaxable. The basis of the claim for the refunding of \$41.73 is that this amount of tax was withheld in error from interest on a savings bank account and Treasury bonds paid to Hugo Menkes, a nonresident alien individual, which income is exempt from taxation.

Section 143(f) of the Internal Revenue Code provides as follows:

“Where there has been an overpayment of tax under this section any refund or credit made under the provisions of section 322 shall be made to the withholding agent unless the amount of such tax was actually withheld by the withholding agent.”

As the tax involved was actually withheld by you from the income paid to the nonresident foreign persons any excess amounts withheld are refundable only to those recipients upon showing that the amounts withheld were in excess of any tax properly due for the taxable year. For this reason your claims will be rejected.

Each of the nonresident foreign persons is privileged to file a claim on Form 843 with the collector of internal revenue, Baltimore, Maryland, for the refunding of any excess tax withheld from his in-

come. [12] Each claim setting forth all facts in detail under oath should be accompanied by a true and accurate income tax return executed to report the person's taxable income received from all sources within the United States during the year involved unless a return was previously filed. In each instance where a return was previously filed reference to that return and to the district in which it was filed should be made in the claim.

Official notice of the disallowance of your claims will be issued by registered mail in accordance with section 3772, chapter 37, of the Internal Revenue Code.

Respectfully,

TIMOTHY C. MOONEY,

Deputy Commissioner.

By (signed) D. L. SIEGRIST

Head of Division [13]

EXHIBIT C

Treasury Department
Washington

Dec. 17, 1941

Office of
Commissioner of Internal Revenue
Address reply to
Commissioner of Internal Revenue
and refer to

IT:C1:CC:Rej.

Bank of America, National Trust and Savings
Association,
1 Powell Street,
San Francisco, California

In re: Claims for refund of \$3,189.83,
\$41.73 and \$3,227.48
For the years 1938 and 1939

Sirs:

Reference is made to letter dated November 25, 1941 wherein you were informed that the claim or claims for refund indicated above would be disallowed. The letter also stated the reasons for the proposed disallowance.

In accordance with the provisions of section 3772 (a)(2) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

Respectfully,

GUY T. HELVERING,
Commissioner,

By (signed) T. MOONEY

Deputy Commissioner. [14]

EXHIBIT D

Claim

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

Collector's Stamp
(Date received)

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☒ Refund of Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused,
or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable
to estate or income taxes).

State of California

County of San Francisco—ss.

(Type or Print)

Name of taxpayer or purchaser of stamps—Bank
of America N. T. & S. A. "Withholding Agent".

Business address—1 Powell Street, San Francisco,
California.

Residence—

The deponent, being duly sworn according to law,
deposes and says that this statement is made on
behalf of the taxpayer named, and that the facts
given below are true and complete:

1. District in which return (if any) was filed—
1st of California at San Francisco.
2. Period (if for income tax, make separate form
for each taxable year) from January 1, 1939,
to December 31, 1939.

3. Character of assessment or tax—Income tax.
4. Amount of assessment, \$10,830.09; dates of payment June 12, 1940.
5. Date stamps were purchased from the Government—
6. Amount to be refunded—\$3,227.46.
7. Amount to be abated (not applicable to income or estate taxes)—
8. The time within which this claim may be legally filed expires, under Section 322 of the Revenue Act of 1938, as amended, on March 15, 1943.

The deponent verily believes that this claim should be allowed for the following reasons:

Return of tax withheld for taxable year 1939 (Form 1042), filed on or about March 15, 1940 included tax on dividends paid by Transamerica Corporation in January and July 1939, per list attached, amounting to \$3,227.46. Said dividends have since been ruled by the Treasury Department to be a return of capital and not taxable. In accordance with said ruling the tax erroneously withheld has been credited back to the accounts of the stockholders and demand for refund is hereby respectfully requested.

(Attach letter-size sheets if space is not sufficient)

Signed R. G. SMITH

Exec. Vice President

Sworn to and subscribed before me this 24th day of July, 1941.

VIRGINIA A. BEEDE,

Notary Public.

(See Instructions on Reverse Side)

[Printer's Note: Reverse side ruled form not filled out.] [15]

EXHIBIT E

Claim

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

Collector's Stamp
(Date received)

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

[x] Refund of Tax Illegally Collected.

[] Refund of Amount Paid for Stamps Unused,
or Used in Error or Excess.

[] Abatement of Tax Assessed (not applicable
to estate or income taxes).

State of California

County of San Francisco—ss.

(Type or Print)

Name of taxpayer or purchaser of stamps—Bank
of America N. T. & S. A. "Withholding Agent".

Business address—1 Powell Street, San Francisco,
California.

Residence—

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—first California.
2. Period (if for income tax, make separate form for each taxable year)—from January 1, 1939, to December 31, 1939.
3. Character of assessment or tax—Income tax.
4. Amount of assessment, \$10,830.09; dates of payment, June 12, 1940.
5. Date stamps were purchased from the Government—
6. Amount to be refunded—\$41.73.
7. Amount to be abated (not applicable to income or estate taxes)—
8. The time within which this claim may be legally filed expires, under Section 322 of the Revenue Act of 1936, as amended, on March 13, 1943.

The deponent verily believes that this claim should be allowed for the following reasons:

A 10% income tax was charged to the account of Hugo Menkes, of 125 Chaussee D'Anners, Brussels, Belgium, on the following items, viz:

Interest on Savings Bank Account.....	\$ 302.26
Interest on \$3,000 Treasury Bonds 27½'s	
1955-60	114.99

\$ 417.25

These items are exempt per Section 143(b) Internal Revenue Code and were erroneously included with other items of taxable interest on page 1 Form 1042 filed March 13, 1940 viz: "Interest \$624.38, tax withheld \$62.44." The tax erroneously withheld \$41.73 has been credited back to the account of Hugo Menkes by the withholding agent and it is respectfully requested that it be given a refund for this overpayment in accordance with Section 143(f) of Internal Revenue Code.

Treas. Bonds exempt per I. T. 2592.

(Attach letter-size sheets if space is not sufficient)

Signed **BANK OF AMERICA**

N. T. & S. A.

Withholding Agent

By **ROBERT C. CARLSON**

Assistant Trust Officer

Sworn to and subscribed before me this 10th day of April, 1941.

FRANCES CURNOW,

Notary Public.

(See Instructions on Reverse Side)

[Printer's Note: Reverse side ruled form not filled out.]

[Endorsed]: Filed July 2, 1942. [16]

[Title of District Court and Cause.]

ANSWER

Now comes the defendant above named and answers the complaint on file herein as follows:

FIRST CAUSE OF ACTION:

I.

Answering Paragraph I of the First Cause of Action, defendant denies that said tax was erroneously or illegally collected from the plaintiff. Admits the remaining allegations of said paragraph.

II.

Admits the allegations of Paragraphs II, III, IV, V and VI of the complaint. [17]

III.

Answering Paragraph VII, defendant denies the allegations that the plaintiff made a notation of credit to the account of the stockholders from whom said tax of \$3,189.83 was withheld, and denies that plaintiff made a notation of credit indicating a credit to which each of said persons is entitled by reason of said deduction of tax. Admits the remaining allegations of Paragraph VII of the First Cause of Action.

IV.

Answering Paragraph VIII defendant denies the allegation that defendant acted unlawfully in collecting said amount of tax shown in said return. The remaining allegations of Paragraph VIII are neither admitted nor denied by the defendant, since said allegations are conclusions of law.

V.

Answering the allegations of Paragraph IX defendant admits that on July 26, 1941, plaintiff filed

a claim for refund of said tax of \$3,189.83. Admits that the plaintiff alleged as the bases for said claim for refund the grounds and facts alleged in the complaint and relied upon in the complaint. Admits that a true copy of said claim (exclusive of voluminous schedules) is attached as Exhibit A to the complaint. Admits that on November 25, 1941, said claim for refund was rejected by letter from the Deputy Commissioner of Internal Revenue, copy of which letter is attached as Exhibit B to the complaint. Admits that on December 17, 1941, the Commissioner of Internal Revenue notified the plaintiff that said claim for refund was rejected in full, and that copy of said notice of rejection is attached as Exhibit C to the complaint. Saving as herein admitted, defendant denies the allegations of Paragraph IX of the First Cause of Action.

VI.

Answering the allegations of Paragraph X, defendant admits that no part of the sum of \$3,189.83 has been repaid or refunded by the defendant or otherwise. Defendant denies that said refund is due and owing to the plaintiff. [18]

Further answering said Paragraph X, defendant alleges that Paragraph 143 (f) of the Internal Revenue Code provides as follows:

“Where there has been an overpayment of tax under this section any refund or credit made under the provisions of section 322 shall be made to the withholding agent unless the

amount of such tax was actually withheld by the withholding agent.”

Defendant is informed and believes, and on such information and belief alleges that the plaintiff actually withheld from said non-resident alien stockholders the amount of tax herein involved, and that said taxes are refundable only to those recipients of dividends upon a showing that the amounts withheld were in excess of any tax properly due from said recipients of dividends for the taxable year.

Defendant further alleges that each of the non-resident foreign persons from whom said tax was withheld, is the proper person to file claim for refund for the tax involved.

SECOND CAUSE OF ACTION:

I.

Defendant refers to Paragraphs I, II, III and IV of the First Cause of Action and to his answer to said paragraphs and makes said answer a part of his answer to the Second Cause of Action as if the same were fully set forth herein.

II.

Defendant admits the allegations of Paragraphs II and III of the Second Cause of Action.

III.

Answering Paragraph IV of the Second Cause of Action defendant denies the allegation that the plaintiff made a notation of credit to the account of

the stockholders from whom said tax of \$3,227.46 was withheld and denies that the notation of credit indicated a credit to which each of said persons was entitled by reason of deduction of said tax. Admits the remaining allegations of Paragraph IV. [19]

IV.

Answering Paragraph V of the Second Cause of Action defendant denies the allegation that the defendant acted unlawfully in collecting from plaintiff the amount of said tax. Defendant neither admits nor denies the remaining allegations of Paragraph V as the same are conclusions of law.

V.

Answering the allegations of Paragraph VI of the Second Cause of Action, defendant admits that on or about July 26, 1941, the plaintiff filed a claim for refund of said tax of \$3,227.46. Admits that in said claim for refund plaintiff alleged as the bases for said claim the same grounds and facts alleged and relied upon in the answer. Admits that a true copy of said claim (exclusive of voluminous schedules) is attached as Exhibit D to the complaint. Admits that on November 25, 1941, the Deputy Commissioner of Internal Revenue advised the plaintiff that said claim for refund was rejected. Admits that a true copy of said letter is attached as Exhibit B to the complaint. Admits that on December 15, 1941 the Commissioner of Internal Revenue notified the plaintiff that said claim for refund was rejected and that a true copy of said notice of rejection is at-

tached as Exhibit C to the complaint. Saving as herein admitted the defendant denies the allegations of Paragraph VI of the Second Cause of Action.

VII.

Defendant admits that no part of said claim for refund has been paid to the plaintiff or otherwise, or at all.

Further answering said Second Cause of Action, defendant alleges that Section 143(f) of the Internal Revenue Code provides as follows:

“Where there has been an overpayment of tax under this section any refund or credit made under the provisions of section 322 shall be made to the withholding agent unless the amount of such tax was actually withheld by the withholding agent.” [20]

Defendant is informed and believes, and on such information and belief alleges that the tax herein involved was actually withheld by the plaintiff as withholding agent from the dividends paid to said non-resident foreign persons. Defendant alleges that refund of said taxes are payable only to those recipients of dividends upon their showing that the amounts withheld were in excess of any tax properly due for the taxable year. Defendant alleges that each of said foreign persons is the proper person to file claim for refund of any excess tax withheld from his income.

THIRD CAUSE OF ACTION:

I.

Defendant refers to Paragraphs I, II and III of Plaintiff's First Cause of Action and to Paragraph II of Plaintiff's Second Cause of Action and to his answer to said paragraphs of the First and Second Causes of Action, and makes said answer a part of his answer to the Third Cause of Action as if the same were fully set forth herein.

II.

Defendant admits the allegations of Paragraph II of the Third Cause of Action.

III.

Answering Paragraph III of the Third Cause of Action, defendant admits that the tax deducted and withheld from said Hugo Menkes, and so reported on form 1042, included \$62.44 computed upon and withheld from income credited to the account of said Hugo Menkes. Admits that said tax amounting to \$62.44, included \$41.73 of tax withheld on interest on the savings account and on interest on the Treasury bond credited to the account of Hugo Menkes, as alleged. Admits that thereafter and prior to filing claim for refund plaintiff credited back to said Hugo Menkes account the amount of tax previously withheld and paid to the Collector. Saving as herein admitted, defendant denies the allegations of Paragraph III. [21]

IV.

Defendant admits that on April 14, 1941, the plaintiff filed claim for refund of said tax of \$41.73 and that the bases for said claim for refund were the same grounds and facts alleged in the complaint. Admits that a true copy of said claim is attached as Exhibit E to the complaint. Admits that on November 25, 1941 the Deputy Commissioner of Internal Revenue advised plaintiff by letter that its claim for refund would be rejected, copy of said letter being attached as Exhibit B to the complaint. Admits that on December 17, 1941, the Commissioner of Internal Revenue notified the plaintiff that said claim for refund was rejected, a true copy of said notice of rejection being attached to the complaint as Exhibit C. Saving as herein admitted defendant denies the allegations of Paragraph IV.

V.

Answering the allegations of Paragraph V, defendant admits that no part of said sum of \$41.73 has been refunded to the defendant, or otherwise, or at all. Denies the remaining allegations of Paragraph V.

Further answering said Third Cause of Action, the defendant alleges that Section 143(f) of the Internal Revenue Code provides as follows:

“Where there has been an overpayment of tax under this section any refund or credit made under the provisions of section 322 shall be made to the withholding agent unless the

amount of such tax was actually withheld by the withholding agent.”

Wherefore defendant prays for judgment in his favor, for his costs and for such other relief as may be just.

FRANK J. HENNESSY,
United States Attorney
ESTHER B. PHILLIPS
Assistant United States
Attorney.

(Receipt of Service.)

[Endorsed]: Filed Oct. 3, 1942. [22]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 2nd day of November, in the year of our Lord one thousand nine hundred and forty-two.

Present: the Honorable John C. Bowen, District Judge for the Western District of Washington, designated to hold and holding this Court.

[Title of Cause.]

COURT'S MINUTE ORDER NOV. 2, 1942

This case came on this day for trial before the Court sitting without a jury. George H. Koster, Esq. appeared as attorney for plaintiff, and Miss Esther B. Phillips, Assistant United States Attorney for defendant. Mr. Koster made a statement to the Court on behalf of the plaintiff, and Miss Phillips made a statement to the Court on behalf of the defendant. After further hearing the attorneys, the Court finds in favor of the plaintiff on the third cause of action. Thereupon the case proceeded to trial on the first and second causes of action. Frank E. Reed was sworn and testified on behalf of the plaintiff. Plaintiff introduced in evidence and filed Plaintiff's Exhibits No. 1 to No. 7 inclusive. Plaintiff rested. The defendant offered no evidence, and the defendant rested. The evidence was thereupon closed. After argument by the attorneys, the case was submitted to the Court for consideration and decision and the same being fully considered by the Court, the Court finds in favor of the defendant on the first and second causes of action. Ordered that judgment be entered in favor of the plaintiff on the third cause of action and in favor of the defendant on the first and second causes of action upon findings of fact and conclusions of law. Further Ordered that findings of fact and conclusions of law and judgment be prepared and served on or before November 6, 1942. Further Ordered that this case

be continued to November 6, 1942, for the settlement of the findings of fact and conclusions of law.

[23]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on the 2nd day of November, 1942 before the Honorable Judge John C. Bowen presiding, without a jury, plaintiff appearing by its attorney George H. Koster, and defendant appearing by its attorneys, Frank J. Hennessy, United States Attorney, and Esther B. Phillips, Assistant United States Attorney. The case having been argued and submitted for decision, the Court makes the following Findings of Fact.

FINDINGS OF FACT

I.

This action arises under the Internal Revenue Laws of the United States. It is brought pursuant to the provisions of Section 24 of the Judicial Code, U.S.C. Title 28, Section 41(5). By the first and second causes of action plaintiff seeks to recover from the defendant, the Collector of In- [24] ternal Revenue, taxes which the plaintiff withheld from dividends on Transamerica Corporation stock payable to non-resident aliens in the years 1938 and 1939 respectively, which withheld taxes the plain-

tiff had duly reported and paid to the defendant, the Collector of Internal Revenue, pursuant to the provisions of Section 143 of the Internal Revenue Code. By the third cause of action the plaintiff seeks to recover an amount of tax erroneously withheld on certain income of a non-resident alien in the year 1939, which tax the plaintiff had paid to the defendant, the Collector of Internal Revenue, but after the date of such payment and upon discovery of its error, the plaintiff had refunded to the nonresident alien.

II.

The plaintiff is a national banking association organized and existing under and by virtue of the laws of the United States of America. Its principal place of business is in the City and County of San Francisco, State of California, and in the Northern District of California, Southern Division.

III.

The defendant was at all times since March 7, 1938 to the time of the institution of this proceeding, the duly appointed, qualified and acting United States Collector of Internal Revenue for the First Internal Revenue Collection District of the State of California, and is a resident of the said Northern District of California. [25]

IV.

At all times herein mentioned plaintiff was the transfer agent of Transamerica Corporation and as such transfer agent had the control, custody, dis-

posal or payment of dividends declared by said Transamerica Corporation to the stockholders of said corporation.

V.

On or about March 15, 1939, the plaintiff filed a withholding tax return on Treasury Department Form 1042, reporting thereon certain income including dividends paid by Transamerica Corporation on the capital stock of said corporation, payable to alien individuals who were not residents of the United States. Plaintiff also reported on this Form the amount of tax which it was withholding from said nonresident alien individuals, and the aggregate amount of said tax was paid by the plaintiff on or about June 15, 1939 to the defendant, as Collector of Internal Revenue for the First District of California.

VI.

The amount of the said tax deducted and withheld from the said non-resident alien individuals, and reported on said return Form 1042, and paid to the defendant, all as alleged in the preceding paragraph hereof, included \$3,189.83 of tax computed upon and withheld from the dividends declared by Transamerica Corporation in 1938 and payable in said year 1938, to said non-resident alien individuals who were stockholders of said company. The amount of said dividends were deposited by Transamerica Corporation with the plaintiff as its agent charged with the duty of [26] making disbursement of said dividends to the stock-

holders entitled thereto, and the plaintiff assumed that the tax of \$3,189.83 which it withheld, reported, and paid to the defendant as aforesaid, was a tax required to be so deducted, withheld and paid by the provisions of said Section 143(b) and (c) of the Internal Revenue Code.

VII.

After the payment of the withheld tax of \$3,189.83 as hereinbefore alleged, and on or about January 31, 1941, the Commissioner of Internal Revenue determined and ruled that the dividends paid by Transamerica Corporation in the year 1938 did not constitute dividend income to its stockholders.

VIII.

On or about July 26, 1941, the plaintiff duly filed its claim for refund of said tax of \$3,189.83, and alleged therein as a basis for said claim the same grounds and facts alleged and relied upon in this proceeding. The refund claim form had attached thereto lists containing the name of approximately 1,000 non-resident alien individuals and these lists showed the name and address of each individual, the total amount of the Transamerica dividend payable to each individual, and the amount of the tax which had been withheld from each individual and for the refund of which the claim was being filed. On November 25, 1941, the Deputy Commissioner of Internal Revenue advised the plaintiff by letter that its claim for refund would be rejected for the reason:

“As the tax involved was actually withheld by you from the income paid to the non-resident foreign persons, any excess amounts withheld are refundable only to those recipients upon showing that the amounts withheld were in excess of any tax properly due for the taxable year. For this reason your claims will be rejected.” [27]

and the official rejection was made by the Commissioner of Internal Revenue on December 17, 1941.

IX.

No part of said sum of \$3,189.83 collected from the plaintiff by the defendant as aforesaid has been repaid or refunded.

X.

On or about March 15, 1940, the plaintiff filed a withholding tax return on Treasury Department Form 1042 reporting thereon certain income including dividends paid by Transamerica Corporation on the capital stock of said corporation, payable to alien individuals who were not residents of the United States. Plaintiff also reported on this Form the amount of tax which it was withholding from said non-resident alien individuals, and the aggregate amount of said tax was paid by the plaintiff on or about June 15, 1940 to the defendant as Collector of Internal Revenue for the First District of California.

XI.

The amount of the said tax deducted and withheld

from the said non-resident alien individuals, and reported on said return Form 1042 for the year 1939, and paid to the defendant, all as alleged in the preceding paragraph hereof, included \$3,227.46 of tax computed upon and withheld from the dividends declared by Transamerica Corporation in 1939 and payable in said year 1939, to said non-resident alien individuals who were stockholders of said company. The amount of said dividends were deposited by Transamerica Corporation with the plaintiff as its transfer agent charged with the duty of making disbursement of said dividends to [28] the stockholders entitled thereto, and the plaintiff assumed that the tax of \$3,227.46 which it withheld, reported and paid to the defendant as aforesaid, was a tax required to be so deducted, withheld, and paid by the provisions of said Section 143(b) and (c) of the Internal Revenue Code.

XII.

On or about July 26, 1941, the plaintiff duly filed its claim for refund of said tax of \$3,227.46, alleging as a basis and grounds for said claim the same grounds and facts alleged and relied upon in this proceeding. The claim was similar in form and substance to the claim for refund filed for the 1938 tax hereinbefore described. On December 17, 1941, the Commissioner of Internal Revenue rejected this claim for the same reasons for which he rejected the 1938 claim. No part of said sum of \$3,227.46 has been repaid or refunded.

XIII.

The plaintiff withheld taxes from non-resident aliens on dividends paid on Transamerica Corporation stock in the year 1937, and filed claim for refund of these taxes, which claim was in form and substance similar to the claims filed for the year 1938 and 1939 hereinbefore described. The Commissioner of Internal Revenue allowed this claim and made a refund of the tax to the plaintiff. Upon receipt of the refund the plaintiff paid the amounts as shown in the claim to those stockholders to whom checks could be transmitted, and plaintiff actually credited the deposit account of each stockholder to whom checks could not be transmitted, and these credits appear as deposit liabilities on the books of the plaintiff Bank. [29]

XIV.

After the plaintiff Bank filed the said refund claims for the years 1938 and 1939, it set up on its records what it designates as "Memorandum Credit Cards," showing as to each person listed on the said refund claims a credit for the amount of the tax for which refund was being claimed for his account. This credit was set up by the plaintiff only on subsidiary card records and is considered by the plaintiff as a contingent credit which would be transferred to the actual liability accounts of the Bank when *an* if the refund claim is finally allowed by the Government, it being the purpose and intention of the plaintiff Bank to handle any refund of the 1938 and 1939 taxes in the same manner in

which it handled the refund received for the 1937 tax.

XV.

In 1939 plaintiff was custodian for the account of a non-resident alien individual residing in Brussels, Belgium. In that year the plaintiff erroneously withheld \$41.73 tax from that individual and reported and paid those taxes to the defendant, the Collector of Internal Revenue. Thereafter plaintiff discovered its mistake and refunded the amount of said tax to the said non-resident alien individual. On April 14, 1941, plaintiff duly filed the claim for the refund of said tax, which claim was rejected by the Collector of Internal Revenue on December 17, 1941. No part of said sum of \$41.73 has been paid or refunded. [30]

From the foregoing facts found, the Court makes the following Conclusions of Law.

CONCLUSIONS OF LAW

I.

The right to sue the United States Government in any proceeding must be predicated upon a specific statutory provision whereby Congress has granted permission that such a suit may be brought. If there is any doubt that a claimant has brought himself within the strict terms or conditions of that permission, it must be resolved against the claimant.

II.

The Internal Revenue Statutes do not permit the withholding agent to sue the Government for re-

fund of taxes withheld by such withholding agent from non-resident aliens, where the withholding agent has actually withheld the tax and has paid the amount of that tax to the United States Government.

III.

With respect to the first and second causes of action in this proceeding, the plaintiff as withholding agent actually withheld the 1938 and 1939 taxes from the non-resident alien stockholders of Trans-america Corporation, and has never paid any part of those withheld amounts to those stockholders.

IV.

The plaintiff as withholding agent, does not come within any provision of law which authorizes the filing of suits against, or the recovery of taxes from the United States Government. Since the plaintiff withheld the 1938 and 1939 tax from non-resident alien individuals and paid that tax to the United States Government, it is not a taxpayer authorized by the Internal Revenue Laws to bring this proceeding for the recovery of such taxes, or to recover such taxes from the United States Government. [31]

V.

The defendant is entitled to judgment upon the first and second causes of action, and plaintiff is entitled to no recovery with respect thereto.

VI.

Regarding the third cause of action, plaintiff erroneously paid a tax in the amount of \$41.73 which

was neither due nor owing, to the defendant, and plaintiff has not withheld this tax from any taxpayer; and the said tax of \$41.73 was erroneously and illegally collected from plaintiff by defendant.

VII.

Plaintiff is entitled to judgment against the defendant, upon said third cause of action, in the sum of \$41.73, together with interest thereon as provided by law.

Accordingly, it is Ordered that as to the first and second causes of action, judgment be entered for the defendant, and plaintiff take nothing by those actions; that as to the third cause of action, judgment be entered for plaintiff in the sum of \$41.73, together with interest thereon at 6% per annum from June 15, 1940, as provided by law.

Plaintiff is entitled to costs.

Dated at San Francisco, California this day of November, 1942.

JOHN C. BOWEN,

Judge of the United States District Court.

Approved as to Form as provided in Rule 22.

GEORGE H. KOSTER,

ESTHER B. PHILLIPS,

Assistant United States Attorney.

[Endorsed]: Filed Nov. 6, 1942. [32]

In the District Court of the United States in and
for the Northern District of California, South-
ern Division.

No. 22219-S

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION, a national bank-
ing association,

Plaintiff,

vs.

CLIFFORD C. ANGLIM, United States Collector
of Internal Revenue for the First Collection
District of California,

Defendant.

JUDGMENT

The cause having come on regularly for trial upon the 2nd day of November, 1942, before the Court, sitting without a jury, George H. Koster, Esq., appearing as attorney for plaintiff, and Miss Esther B. Phillips, Assistant United States Attorney, appearing as attorney for defendant, and the cause having been submitted to the Court for consideration and decision, and the Court after due deliberation having filed its findings and ordered that Judgment be entered herein in favor of the defendant as to the First and Second causes of action, and that judgment be entered herein in favor of the plaintiff as to the Third cause of action. [33]

Now, Therefore, by virtue of the law and by reason of the findings aforesaid, it is Ordered. Ad-

judged and Decreed, that plaintiff take nothing by its First Cause of Action and its Second Cause of Action, in this proceeding, and that plaintiff do have and recover upon its Third Cause of Action in this proceeding, the sum of \$41.73 together with interest thereon at the rate of 6% per annum from June 15, 1940, to a date preceding the refund thereof by not more than thirty days; and plaintiff is entitled to costs and disbursements in this action expended in the amount of \$17.30.

Dated at San Francisco, California, this 6th day of November, 1942.

JOHN C. BOWEN,

Judge of the United States
District Court.

Approved as to Form as provided in Rule 22.

GEORGE H. KOSTER,

ESTHER B. PHILLIPS,

Ass't. U. S. Attorney.

[Endorsed]: Filed Nov. 6, 1942. [34]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Bank of America National Trust and Savings Association, a national banking association, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the

Ninth Circuit from the final judgment entered in this action on November 6, 1942.

GEORGE H. KOSTER,
Attorney for Appellant, 300 Montgomery Street,
San Francisco, California.

[Endorsed]: Filed Feb. 2, 1943. [35]

[Title of District Court and Cause.]

COST BOND ON APPEAL

4625952

A Stock Company—Established 1890

FIDELITY AND DEPOSIT COMPANY

Home Office of Maryland Baltimore

Whereas, Bank of America National Trust and Savings Association, a national banking association, Plaintiff herein, has prosecuted or is about to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth District from the final judgment entered in this action on November 6, 1942.

Know All Men By These Presents:

That we, Bank of America National Trust and Savings Association, a national banking association, as Principal, and Fidelity and Deposit Company of Maryland, a corporation created, organized and existing under and by virtue of the laws of the State of Maryland and duly authorized to transact business in the State of California, as Surety, are held

and firmly bound unto Clifford C. Anglim, United States Collector of Internal Revenue for the First Collection District of California, Defendant in the above entitled action, in the full and just sum of Two Hundred Fifty and No/100 (\$250.00) Dollars, lawful money of the United States of America to be paid to the said Clifford C. Anglim, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Now, Therefore, the condition of this obligation is such that if the said Principal, Bank of America National Trust and Savings Association, a national banking association, will prosecute its appeal to effect and answer all costs if it fails to make good its appeal, not exceeding however the sum of Two Hundred Fifty and No/100 (\$250.00) Dollars, then this obligation shall be null and void, otherwise to remain in full force and effect.

And further, it is expressly understood and agreed that in case of a breach of any condition of the above obligation, the Court in the above entitled matter may, upon notice to the Fidelity and Deposit Company of Maryland, of not less than ten (10) days, proceed summarily in the action or suit in which the same was given to ascertain the amount which said Surety is bound to pay on account of such breach, and render judgment therefor against it and award execution therefor.

The premium charged for this bond is \$10.00 Dollars per annum.

Signed, Sealed and Dated this 2nd day of February, 1943.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION

By

[Seal]

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

By GUERTIN CARROLL

Attorney-in-Fact

Attest:

E. CASLER

Attesting Agent

State of California,

City and County of San Francisco—ss.

On this 2nd day of February, A. D. 1943, before me, Margaret Keene Whitmore, a Notary Public in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared, Guertin Carroll, Attorney-in-Fact, and E. Casler, Agent, of the Fidelity and Deposit Company of Maryland, a corporation, known to me to be the persons who executed the within instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same, and also known to me to be the persons whose names are subscribed to the within instrument as the Attorney-in-Fact and Agent respectively of said corporation, and they, and each of them, acknowledged to me that

they subscribed the name of said Fidelity and Deposit Company of Maryland thereto as principal and their own names as Attorney-in-Fact and Agent respectively.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco the day and year first above written.

[Seal] MARGARET KEENE WHIT-
MORE

Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires April 21, 1945. [36]

[Endorsed]: Filed Feb. 2, 1943.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED
UPON ON APPEAL

(1) The District Court erred as a matter of law in determining that plaintiff was not authorized under the law to maintain this action for the recovery of income taxes withheld by plaintiff as withholding agent from non-resident alien individuals and paid to defendant from payments which did not constitute taxable income to the non-resident aliens.

(2) The District Court erred as a matter of law in determining that a withholding agent is not authorized to maintain an action for the recovery of

income taxes erroneously withheld from payments to non-resident aliens and paid to the Collector of Internal Revenue.

(3) The District Court erred in failing and refusing to hold that plaintiff was entitled to the refund of the taxes paid to defendant. [37]

(4) The District Court erred as a matter of law in rendering judgment against plaintiff on the first and second causes of action herein.

Dated: February 10th, 1943.

GEORGE H. KOSTER
BAYLEY KOHLMEIER
Attorneys for plaintiff and
appellant

Service of above Statement of Points to be Relied upon and receipt of a copy thereof is hereby acknowledged.

FRANK J. HENNESSY
ESTHER B. PHILLIPS
Assistant U. S. Attorney
Attorneys for defendant.

[Endorsed]: Filed Feb. 10, 1943. [38]

[Title of District Court and Cause.]

STIPULATION AS TO RECORD

Pursuant to Rule 75(f) of the Rules of Court Procedure it is hereby stipulated and agreed by and between the parties hereto that the following designated portions of the record, proceedings and evi-

dence be included in the record on appeal and the Clerk of the Court is requested to prepare the record in accordance with this stipulation:

- (1) Complaint and exhibits attached thereto.
- (2) Answer.
- (3) Minute Order Decision.
- (4) Findings of Fact and Conclusions of Law.
- (5) Judgment.
- (6) Notice of Appeal with date of filing. [39]
- (7) Bond for costs on appeal.
- (8) Statement of Points to be Relied upon on appeal.
- (9) This Stipulation as to Record.

Dated: February 10th, 1943.

GEORGE H. KOSTER

BAYLEY KOHLMEIER

Attorneys for Plaintiff

FRANK J. HENNESSY

United States Attorney

ESTHER B. PHILLIPS

Assistant U. S. Attorney

Attorneys for Defendant

[Endorsed]: Filed Feb. 10, 1943. [40]

District Court of the United States
Northern District of California

**CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of

California, do hereby certify that the foregoing 40 pages, numbered from 1 to 40, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Bank of America N. T. & S. A., a national banking association, vs. Clifford C. Anglim, United States Collector of Internal Revenue for the First Collection District of California, No. 22219-S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Five Dollars and Sixty Cents (\$5.60) and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 10th day of March, A. D. 1943.

[Seal]

WALTER B. MALING

Clerk

WM. J. CROSBY

Deputy Clerk

[Endorsed]: No. 10384. United States Circuit Court of Appeals for the Ninth Circuit. Bank of America, National Trust and Savings Association, a national banking association, Appellant, vs. Clifford C. Anglim, United States Collector of Internal Revenue for the First Collection District for California, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed March 10, 1943.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the Circuit Court of Appeals
For the Ninth Circuit

Docket No. 10384

**BANK OF AMERICA NATIONAL TRUST
AND SAVINGS ASSOCIATION**, a national
banking association,

Appellant,

vs.

CLIFFORD C. ANGLIM, United States Collector
of Internal Revenue for this First Collection
District of California,

Appellee.

**STATEMENT OF POINTS TO BE RELIED
UPON ON APPEAL; DESIGNATION OF
PORTION OF RECORD TO BE PRINTED**

Comes now the appellant above named by its attorneys of record and complying with the rules of this Court states that it intends to rely on appeal on all and each of the points alleged in the statement of points to be relied upon on appeal filed with the District Court below and included in the transcript herein.

Appellant further states that it relies upon the entire record certified by the Clerk of the District

Court to this Court, and directs that said record so certified be printed as the record on appeal.

Respectfully submitted,

GEORGE H. KOSTER BK

BAYLEY KOHLMEIER

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San Francisco, California.

[Endorsed]: Filed Mar. 17, 1943. Paul P. O'Brien,
Clerk.

No. 10,384

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BANK OF AMERICA, NATIONAL TRUST AND
SAVINGS ASSOCIATION (a national banking
association),

Appellant,

VS.

CLIFFORD C. ANGLIM, United States Col-
lector of Internal Revenue for the First
Collection District of California,

Appellee.

APPELLANT'S OPENING BRIEF.

GEORGE H. KOSTER,

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FILED

MAY 7 - 1943

PAUL P. O'BRIEN,
CLERK

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No. 10,384

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

BANK OF AMERICA, NATIONAL TRUST AND
SAVINGS ASSOCIATION (a national banking
association),

Appellant,

vs.

CLIFFORD C. ANGLIM, United States Col-
lector of Internal Revenue for the First
Collection District of California,

Appellee.

APPELLANT'S OPENING BRIEF.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the District Court of the United States for the Northern District of California, Southern Division. The only opinion rendered by the Court below appears in the record herein at page 32.

Appellant is a national banking association organized and existing under and by virtue of the laws of the United States of America and has its principal place of business in the City and County of San Francisco, California. The causes of action herein are for the recovery of income taxes erroneously and illegally

collected from appellant as withholding agent under Section 143 of the Revenue Act of 1938 and Section 143 of the Internal Revenue Code (R. 4, 7). Written claims for refund were filed with the appellee as Collector of Internal Revenue (R. 5, 8) which claims were rejected by the Commissioner of Internal Revenue (R. 6, 9). This action for the recovery of said taxes was brought in the District Court pursuant to the provisions of Section 24 of the Judicial Code, United States Code, Title 28, Section 41(5). The matter came to trial before the District Court and the judgment of that Court was entered on November 6, 1942 (R. 43). On February 2, 1943, under authority of Section 128 of the Judicial Code, United States Code, Title 28, Section 225, appeal was taken to this Court to review the judgment of the Court below (R. 44). This appeal and the transcript of record were filed and docketed in this Court on March 10, 1943 (R. 52).

STATEMENT OF THE CASE.

The facts in this appeal are not in dispute and are admitted by the pleadings or found by the Court in its findings of fact. The complaint alleged three causes of action, the first two of which were decided in favor of appellee and are involved in this appeal. The two causes of action present identical issues but involve different years. The facts may be summarized as follows:

(1) Appellant is a national banking association organized and existing under and by virtue of the laws

of the United States of America, and has its principal place of business in the City and County of San Francisco, State of California (R. 34).

(2) At all times material hereto, appellee was the United States Collector of Internal Revenue for the First Internal Revenue Collection District of the State of California, and a resident of the Northern District of California (R. 34).

(3) At all times material hereto, appellant was the transfer agent of Transamerica Corporation, and as such transfer agent had the control, custody, disposal or payment of dividends, declared by said Transamerica Corporation to the stockholders of said corporation (R. 34).

(4) During the years 1938 and 1939 appellant, as transfer agent for Transamerica Corporation, distributed dividends declared by said corporation to its stockholders. Among the stockholders of Transamerica Corporation were certain non-resident aliens. Appellant assumed that it was required to withhold income taxes from the distributions to non-resident aliens by the provisions of Section 143(b) and (c) of the Revenue Act of 1938, and Section 143(b) and (c) of the Internal Revenue Code (R. 36, 38) and withheld \$3189.83 from the dividends distributed to the non-resident alien stockholders of Transamerica Corporation in 1938 (R. 36) and withheld \$3227.46 from the dividends distributed to the non-resident alien stockholders of Transamerica Corporation in 1939 (R. 38).

(5) Appellant filed withholding tax returns on Treasury Department form 1042 for the years 1938

and 1939 on March 15, 1939 and March 15, 1940, respectively and included therein the dividends paid by Transamerica Corporation to non-resident aliens during the year 1938 and 1939 (R. 35, 37). Appellant also reported in said returns the amounts of tax which it was withholding from said non-resident alien individuals. The taxes withheld by appellant corporation during the year 1938 including the sum of \$3189.83 withheld from the non-resident alien stockholders of Transamerica Corporation were paid to appellee as Collector of Internal Revenue on or about June 15, 1939 (R. 35). The taxes withheld by appellant corporation during the year 1939 including the sum of \$3227.46 withheld from the non-resident alien stockholders of Transamerica Corporation were paid to appellee as Collector of Internal Revenue on or about June 15, 1940 (R. 37).

(6) On or about January 31, 1941 the Commissioner of Internal Revenue ruled that dividends paid by Transamerica Corporation during the years 1938 and 1939 did not constitute dividend income to its stockholders (R. 36; Complaint R. 7 and 8; Admitted by Answer R. 26 and 27).

(7) On or about July 26, 1941, appellant duly filed claims for refund for the taxes withheld and paid to appellee as aforesaid for the year 1938 in the amount of \$3189.83 and for the taxes withheld and paid to appellee for the year 1939 in the amount of \$3227.46. In said claims for refund appellant alleged as the basis the same grounds and facts relied upon in this proceeding. There were attached to said refund claim lists

containing the names of approximately 1000 non-resident alien individuals and these lists showed the name and address of each individual, the total amount of the Transamerica dividend payable to each individual, and the amount of tax which had been withheld from each individual for the refund of which the claim was being filed (R. 36, 38). On November 25, 1941, the Deputy Commissioner of Internal Revenue advised appellant by letter that its claims for refund would be rejected for the reason

“As the tax involved was actually withheld by you from the income paid to the non-resident foreign persons, any excess amounts withheld are refundable only to those recipients upon showing that the amounts withheld were in excess of any tax properly due for the taxable year. For this reason your claims will be rejected.” (R. 16, 37 and 38.)

Said claims for refund were officially rejected by the Commissioner of Internal Revenue on December 17, 1941 (R. 36 and 37).

(8) No part of said \$3189.83 and said \$3227.46 collected from appellant by appellee as aforesaid was repaid or refunded (R. 37 and 38).

(9) The appellant withheld taxes from non-resident aliens on dividends paid on Transamerica Corporation stock in the year 1937, and filed claim for refund of these taxes, which claim was in form and substance similar to the claims filed for the years 1938 and 1939 hereinbefore described. The Commissioner of Internal Revenue allowed this claim and made a

refund of the tax to the appellant. Upon receipt of the refund the appellant paid the amounts as shown in the claim to those stockholders to whom checks could be transmitted, and appellant actually credited the deposit account of each stockholder to whom checks could not be transmitted, and these credits appear as deposit liabilities on the books of the appellant bank (R. 39).

(10) After the appellant bank filed the said refund claims for the years 1938 and 1939, it set up on its records what it designates as "Memorandum Credit Cards", showing as to each person listed on the said refund claims a credit for the amount of the tax for which refund was being claimed for his account. This credit was set up by the appellant only on subsidiary card records and is considered by the appellant as a contingent credit which would be transferred to the actual liability accounts of the bank when and if the refund claim is finally allowed by the Government, it being the purpose and intention of the appellant bank to handle any refund of the 1938 and 1939 taxes in the same manner in which it handled the refund received for the 1937 tax (R. 39).

(11) Appellant filed its complaint for the recovery of the above taxes, which complaint set forth two causes of action based upon the aforementioned claims for refund. Said complaint included a third cause of action which is not involved in this appeal (R. 29).

(12) Upon the above facts, which were found in the findings of fact (R. 33-40), the District Court concluded that appellant had no right or authority under

the laws of the United States to maintain the actions alleged in the first and second causes of action herein (R. 40-41). Judgment was rendered for appellee on the first and second causes of action and for appellant on the third cause of action (R. 43-44).

SPECIFICATION OF ERRORS.

Appellant relies upon the following errors committed by the District Court:

(1) The District Court erred as a matter of law in determining that appellant was not authorized under the law to maintain this action for the recovery of income taxes withheld by appellant as withholding agent from non-resident alien individuals and paid to appellee from payments which did not constitute taxable income to the non-resident aliens.

(2) The District Court erred as a matter of law in determining that a withholding agent is not authorized to maintain an action for the recovery of income taxes erroneously withheld from payments to non-resident aliens and paid to the Collector of Internal Revenue.

(3) The District Court erred in failing and refusing to hold that appellant was entitled to the refund of the taxes paid to defendant.

(4) The District Court erred as a matter of law in rendering judgment against appellant on the first and second causes of action herein.

ISSUE PRESENTED.

Whether a withholding agent may recover an admitted overpayment of income taxes which it withheld and paid to the Collector of Internal Revenue, in an action against the collector to whom the taxes were paid.

STATUTES INVOLVED.

The pertinent portions of Sections 143 and 322 of the Revenue Act of 1938, and the Internal Revenue Code, are set forth in the appendix hereto.

SUMMARY OF ARGUMENT.

(1) The taxes here involved were admittedly overpaid. Appellant, being the taxpayer who was liable for and who paid the taxes and having complied with all the procedural requirements, is entitled to judgment for the amount of the overpayment against appellee, the Collector of Internal Revenue, to whom the taxes were paid.

(2) The provisions of Section 143(f) of the Internal Revenue Code have no application to an action against a Collector of Internal Revenue for the recovery of taxes overpaid.

(3) In any event, Section 143(f) of the Internal Revenue Code does not restrict recovery in this case because the purpose of that section has been fully complied with.

ARGUMENT.**I.****INTRODUCTORY STATEMENT.**

As set forth in the statement of facts, this action is for the recovery of income taxes which appellant withheld from dividends of Transamerica Corporation payable to certain non-resident aliens and which appellant paid to appellee as provided in Section 143 of the Revenue Act of 1938 and Section 143 of the Internal Revenue Code. It was later determined that said dividends were not taxable income to the stockholders of Transamerica Corporation and that no tax was payable thereon. Appellant filed claims for refund for the overpayments and upon rejection of the claims brought this action in the District Court.

The taxes in question were not imposed upon appellant's income and appellant has no financial interest in any recovery which it might make. Appellant has no intention of retaining any sums recovered and will immediately upon receipt of the refund pay over the entire recovery to the stockholders from whom the tax was withheld.

Appellant's only interest in this action is the protection of the interests of the individuals who due to circumstances beyond their control are unable to protect their interests. Appellant is also convinced that it is the proper party to maintain this action to recover the overpayments and that it has a moral if not a legal duty to the individuals concerned to take the necessary action to protect their interests.

II.

THE OVERPAYMENTS ARE ADMITTED.

There is no dispute between the parties with regard to the fact that the taxes here involved were overpaid. At the time the dividends were paid by Transamerica Corporation and distributed by appellant it was not known whether they constituted income to the stockholder recipients. Appellant assumed that it was required by Section 143(b) and (c) of the Revenue Act of 1938 and Section 143 of the Internal Revenue Code to withhold the tax. Appellant did withhold the taxes and paid them to appellee as Collector of Internal Revenue. On or about January 31, 1941 the Commissioner of Internal Revenue determined that the dividends paid by Transamerica Corporation in the years 1938 and 1939 did not constitute dividend income to the stockholders (R. 36).

As soon as appellant learned that said dividends paid in 1938 and 1939 did not constitute taxable income, it filed claims for refund for the tax of \$3189.83 withheld and paid to appellee on the dividends paid in 1938 and for the tax of \$3227.46 withheld and paid to appellee upon the dividends paid in 1939. The claims for refund were rejected by the Commissioner of Internal Revenue on the ground that since appellant had withheld the taxes any sums refundable were payable only to the non-resident alien stockholders of Transamerica Corporation (R. 37, 38).

This action was then commenced in the District Court for the recovery of said taxes. The District Court gave judgment for appellee and based its judg-

ment upon the conclusions that appellant was not the proper party to recover said taxes. Neither appellee nor the Commissioner of Internal Revenue has questioned the fact that said taxes were erroneously paid and were refundable to the proper party. The Court below expressly found that the Commissioner determined that the dividends paid by Transamerica Corporation in 1938 and 1939 did not constitute dividend income (R. 36) and it necessarily follows that no taxes were payable thereon. Since the taxes in question were admittedly overpaid, if appellant is authorized under the law to maintain this action, it is entitled to judgment.

III.

APPELLANT IS THE PROPER PARTY TO RECOVER THE TAXES.

This action is not against the United States or against the Commissioner of Internal Revenue but solely against appellee who is the Collector of Internal Revenue who collected the taxes in question. It has long been recognized that a taxpayer who has overpaid internal revenue taxes may bring an action against the Collector of Internal Revenue to whom the taxes were paid. Such an action is a personal action at common law in the nature of assumpsit, and is not an action against the United States.

United States v. Kales (1941), 314 U. S. 186;

Sage v. United States (1919), 250 U. S. 33;

United States v. Nunnally Investment Co.
(1942), 316 U. S. 258.

All of the requirements of law have been complied with.

There are certain requirements which must be complied with in an action against the Collector but they have all been met in this action.

Appellant paid the taxes in question to appellee (R. 36, 38) and is the taxpayer. Section 143(c) of the Revenue Act of 1938 and Section 143(c) of the Internal Revenue Code expressly made the person required to deduct and withhold a tax liable for such tax. Section 901(a)(14) of the Revenue Act of 1938 defined "taxpayer" as follows: "The term 'taxpayer' means any person subject to a tax imposed by this Act." See also Section 3797(a)(14) of Internal Revenue Code. In *Houston Street Corporation v. Commissioner* (CCA 5, 1936), 84 F. (2d) 821, the Court stated that there was no distinction between "liable for such tax" and "subject to a tax" and concluded that a withholding agent was the taxpayer with respect to the sums required to be withheld from payments to non-resident aliens.

Section 3772 of the Internal Revenue Code provides that no suit or proceeding shall be maintained in any Court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed and collected until a claim for refund or credit has been duly filed with the Commissioner as provided by law and the regulations. It is also provided that such suit must be commenced within two years after the rejection of such claim.

It is admitted by the pleadings herein and expressly found by the Court below that appellant filed claims

for refund of the taxes in question as required by the law and the regulations and set forth therein the same facts and grounds herein relied upon (Complaint Para. IX R. 5, admitted by Answer Para. V R. 24 and 25; Findings of Fact R. 36; Complaint Para. VI second cause of action R. 8, admitted by Answer R. 27; Findings of Fact R. 38). The claims for refund were rejected by the Commissioner of Internal Revenue on December 17, 1941 (R. 37, 38). This action was commenced on July 2, 1942 (R. 23).

Since it is admitted that the payments from which the taxes were withheld were not taxable income it follows that the taxes in question were illegally assessed and collected. Since appellant has complied with all the requirements of law for the recovery of said taxes it is submitted that judgment should have been rendered for appellant.

IV.

JUDGMENT OF DISTRICT COURT BASED UPON ERRONEOUS GROUNDS.

The Court below based its judgment upon the ground that appellant was not the proper party to maintain this action and recover the taxes in question. This conclusion was based upon the further conclusion that the United States Government can be sued only with its consent and it has not consented to be sued by a withholding agent.

The Court's premise that this action is against the United States is erroneous. This action is a personal

action against appellee and the United States is a stranger to the action. The fact that the United States may assume the payment of a judgment rendered does not make it a party to the action or give it an interest in the action at this stage of the proceedings.

The United States Supreme Court has several times considered the question of whether an action against a Collector of Internal Revenue is an action against the United States and has consistently held that the United States is not a party to such action. In the recent case, *United States v. Kales* (1941), 314 U. S. 186, the Court held that judgment in an action against the Collector did not bar a later suit against the United States to recover taxes paid for the same year to a different Collector.

In the opinion which was written by Chief Justice Stone, the Court stated, pages 199-200:

“* * * The judgment against the Collector is a personal judgment, to which the United States is a stranger except as it has obligated itself to pay it. (Citations omitted).”

While the statutes have for most practical purposes reduced the personal liability of the collector to a fiction, the course of the legislation indicates clearly enough that it is a fiction intended to be acted upon to the extent that the right to maintain the suit and its incidents, until judgment rendered, are to be left undisturbed, Among its incidents is the right to a jury trial, which is not available in suits against the United States. 28 U. S. C. Section 41(20).”

In *Sage v. United States* (1919), 250 U. S. 33, 39 Sup. Ct. 415, the Court stated:

“* * * But no one could contend that technically a judgment of a District Court in a suit against a collector was a judgment against or in favor of the United States. It is hard to say that the United States is privy to such a judgment or that it would be bound by it if a suit were brought in the Court of Claims. The suit is personal and its incidents, such as the nature of the defenses open and the allowance of interest are different. It does not concern property in which the United States asserts an interest on its own behalf or as trustee, as in *Minnesota v. Hitchcock*, 185 U.S. 373. At the time the judgment is entered the United States is a stranger. Subsequently the discretionary action of officials may, or it may not give the United States a practical interest in the amount of the judgment, as determining the amount of a claim against it, but the claim would arise from the subsequent official act, not from the judgment itself.”

See also

Smietanka v. Indiana Steel Co. (1921), 257 U.S. 1, 42 Sup. Ct. 1;

United States v. Nunnally Investment Co. (1942), 316 U.S. 258.

Since the United States is not a party to this action but is in fact a stranger thereto, it follows that the consent of the United States is not essential to the maintenance of the action. The United States may and has prescribed certain procedural requirements, but as pointed out above, all the procedural requirements have admittedly been complied with.

Appellant submits that the District Court erred in concluding that this action could be maintained only with the consent or permission of the United States and that the statutes do not permit the maintenance of this action.

V.

SECTION 143(f) OF THE INTERNAL REVENUE CODE DOES NOT FORBID RECOVERY BY APPELLANT.

While the Court below did not expressly so state, it appears that its conclusions that appellant could not recover were based upon Section 143(f) of the Internal Revenue Code which reads as follows:

“(f) Refunds and Credits.—Where there has been an overpayment of tax under this section any refund or credit made under the provisions of section 322 shall be made to the withholding agent unless the amount of such tax was actually withheld by the withholding agent.”

It is to be noted that Section 143(f) expressly refers to refunds and credits authorized by Section 322 of the Code. Section 322 refers exclusively to refunds and credits which can be made by the Commissioner of Internal Revenue upon his own determination; or upon the determination of the Board of Tax Appeals (now the Tax Court of the United States). Said section does not authorize payment of judgments or make any reference thereto. If appellant is granted judgment in this action and said judgment is satisfied by the United States, the payment of said judgment would not be by authority granted by Section 322

but by authority granted by Section 989 of the Revised Statutes which reads as follows:

“Sec. 989. When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury.”

Section 143(f) makes no reference either directly or by inference to Section 989 of the Revised Statutes or to payments of judgments pursuant thereto.

Appellant respectfully submits that Section 143(f) has no bearing upon appellant's right to recover in this action and in no way restricts or limits the right of appellant to recover judgment against appellee.

VI.

THE PRINCIPLE OF SECTION 143(f) HAS BEEN COMPLIED WITH.

Even if Section 143(f) did have application to this action it is believed that said section would not prevent recovery by appellant in that the principle of said section has been complied with.

In authorizing and directing the refund of overpayments to withholding agents, Section 143(f) recognizes a withholding agent as the taxpayer, and recognizes the right of a withholding agent to file a claim for refund as provided in Section 322. The restriction against payment of the refund to a withholding agent when the tax was actually withheld by the withholding agent was undoubtedly intended to prevent such agent from recovering twice, once from the persons from whom the taxes were withheld and again from the Government, see *Capital Estates, Inc. v. Commissioner*, 46 B.T.A. 986. Or perhaps to prevent another recovery from the government by the individual non-resident aliens concerned. *Pauker v. U. S.*, 23 F. Supp. 821. If the tax was not withheld or if the withholding agent withheld but later reimbursed or committed itself to reimburse the persons from whom the tax was withheld the situation is the same as though there had been no withholding and the restriction contained in 143(f) serves no purpose.

In the present case appellant did withhold the tax but has definitely committed itself to pay over to the non-resident aliens any sums recovered in this action. Appellant has set up contingent credits for the benefit of the persons from whom the tax was withheld and intends to pay over to such persons any sums recovered (R. 39). The good faith of appellant is established by its declarations to that effect both before the Court below and to this Court and by the fact that it did pay over to the individuals concerned the 1937 income taxes similarly withheld but which

were refunded to appellant by the Commissioner of Internal Revenue (R. 39).

Neither could the Government be liable for further payment to the individuals. Payment to appellant and payment by appellant to the individuals would undoubtedly estop any individual from asserting a further claim for said taxes. Also the time within which claims could be filed by the individuals has expired (Section 322 Internal Revenue Code). Neither the Commissioner of Internal Revenue nor appellee has suggested at any time during the proceedings in this case that any claims for refund have been filed by the individuals for the taxes here involved.

Appellant submits that the purpose of Section 143(f) has been fully satisfied so that even if that section were applicable to this action, it would not prohibit or restrict appellant's right to recover.

So far as appellant has been able to discover, this action is the first to present the issues here involved. Similar issues, however, were considered in

Houston Street Corporation v. Commissioner,
(CCA-5, 1936), 84 F. (2d) 821;

Pauker v. U. S. (D. C. N. Y. 1938), 23 F.
Supp. 821;

Capital Estates, Inc. v. Commissioner (1942),
46 BTA 986.

In *Houston Street Corporation v. Commissioner*, (supra), the Court held that a withholding agent was a taxpayer and that the Board of Tax Appeals had jurisdiction to hear a petition of a withholding agent from a proposal to assess additional taxes.

In *Pauker v. U. S.*, (supra), the Court held that a withholding agent could not recover in an action against the United States for taxes erroneously withheld and paid to the Government. If the decision in that case is sound it is distinguishable from the present case in that the action was against the United States and not against the Collector, it did not appear that the withholding agent had committed itself to pay over the sums recovered to the individuals involved, and it did not appear that the Government was protected against further recovery by the individuals.

In *Capital Estates, Inc. v. Commissioner*, (supra), the Board held that it could not order the credit of an overpayment of taxes withheld against additional taxes due from the withholding agent upon its own income. Credits ordered by the Board are made under authority of Section 322, so Section 143(f) was directly applicable. Furthermore, the withholding agent sought credit against its own liability and it had not committed itself to reimburse the individuals from whom the tax had been withheld.

It is respectfully submitted that neither *Pauker v. U. S.* supra, nor *Capital Estates, Inc. v. Commissioner* is inconsistent with appellant's contentions herein and neither of said cases supports the conclusion of the Court below.

CONCLUSION.

In conclusion appellant submits that it is the proper party to recover the taxes here involved; that

on the facts admitted by the parties and found by the Court below appellant is entitled to judgment against appellee; that the Court below committed error in concluding that appellant was not the proper party to maintain this action and could not recover against appellee. It is further submitted that the decision and judgment of the Court below was erroneous and should be reversed with directions to enter judgment for appellant on the first and second causes of action herein.

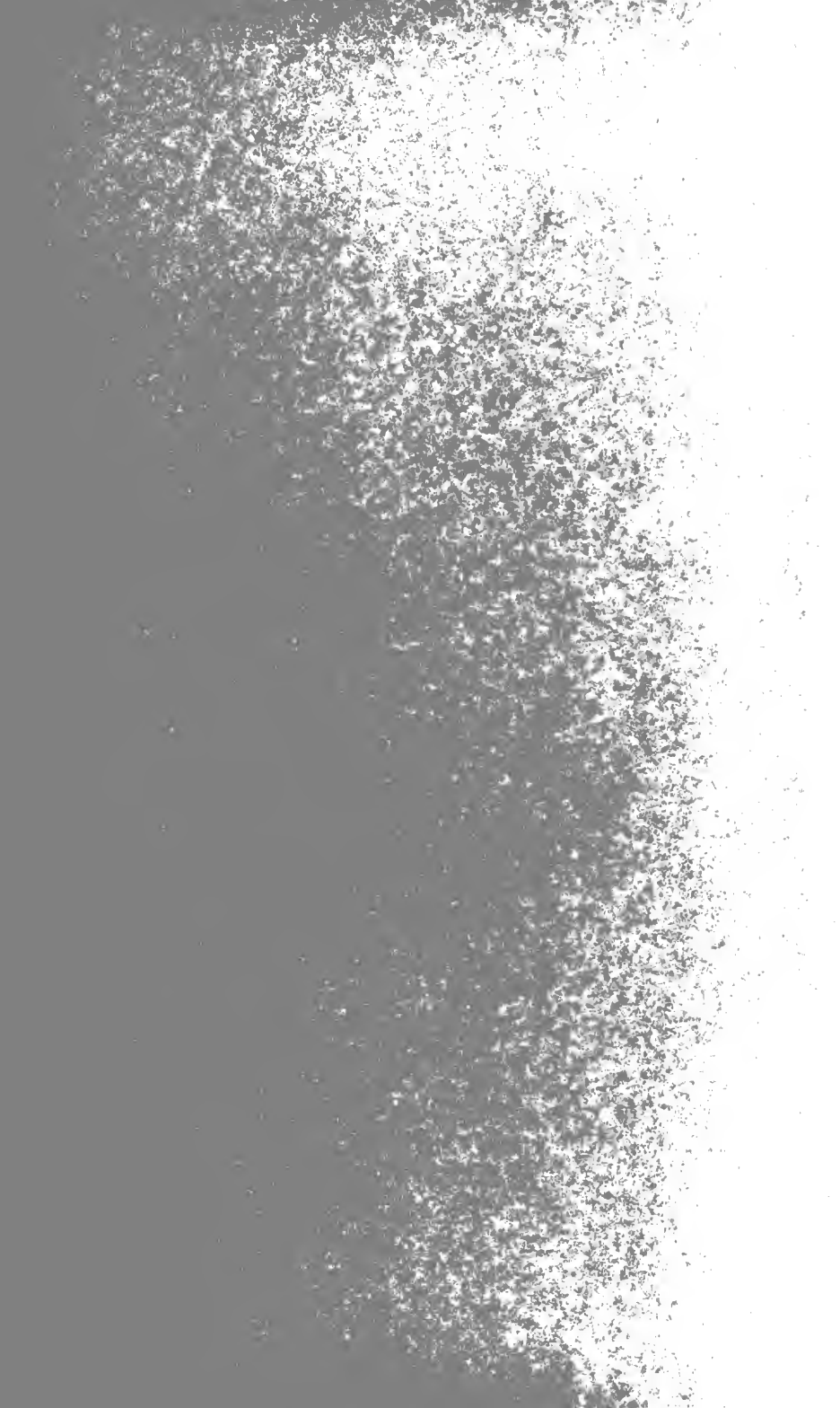
Dated, San Francisco,
May 7, 1943.

GEORGE H. KOSTER,
BAYLEY KOHLMEIER,
Attorneys for Appellant.

(Appendix Follows.)



Appendix.



Appendix

Section 143 of the Revenue Act of 1938, and Section 143 of the Internal Revenue Code (1939):

SEC. 143. WITHHOLDING OF TAX AT SOURCE.

(a) Tax-free covenant bonds.— * * *

(b) Nonresident aliens.—All persons, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of the United States, having the control, receipt, custody, disposal, or payment of interest (except interest on deposits with persons carrying on the banking business paid to persons not engaged in business in the United States and not having an office or place of business therein), dividends, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income (but only to the extent that any of the above items constitutes gross income from sources within the United States), of any nonresident alien individual, or of any partnership not engaged in trade or business within the United States and not having any office or place of business therein and composed in whole or in part of nonresident aliens, shall (except in the cases provided for in subsection (a) of this section and except as otherwise provided in regulations prescribed by the Commissioner under section 215) deduct and withhold from such annual or periodical gains, profits, and income a tax equal to 10 per centum thereof, except that such rate shall be reduced, in the case of a nonresident alien in-

dividual a resident of a contiguous country, to such rate (not less than 5 per centum) as may be provided by treaty with such country: PROVIDED, that no such deduction or withholding shall be required in the case of dividends paid by a foreign corporation unless (1) such corporation is engaged in trade or business within the United States or has an office or place of business therein, and (2) more than 85 per centum of the gross income of such corporation for the three-year period ending with the close of its taxable year preceding the declaration of such dividends (or for such part of such period as the corporation has been in existence) was derived from sources within the United States as determined under the provisions of section 119: PROVIDED FURTHER, That the Commissioner may authorize such tax to be deducted and withheld from the interest upon any securities the owners of which are not known to the withholding agent. Under regulations prescribed by the Commissioner, with the approval of the Secretary, there may be exempted from such deduction and withholding the compensation for personal services of nonresident alien individuals who enter and leave the United States at frequent intervals.

(c) Return and payment.—Every person required to deduct and withhold any tax under this section shall make return thereof on or before March 15 of each year and shall on or before June 15, in lieu of the time prescribed in section 56, pay the tax to the official of the United States Government authorized to receive it. Every such person is hereby made liable for such tax and is hereby indemnified against the claims and de-

mands of any person for the amount of any payments made in accordance with the provisions of this section.

(d) *Income of recipient.*—Income upon which any tax is required to be withheld at the source under this section shall be included in the return of the recipient of such income, but any amount of tax so withheld shall be credited against the amount of income tax as computed in such return.

(e) *Tax paid by recipient.*—If any tax required under this section to be deducted and withheld is paid by the recipient of the income, it shall not be re-collected from the withholding agent; nor in cases in which the tax is so paid shall any penalty be imposed upon or collected from the recipient of the income or the withholding agent for failure to return or pay the same, unless such failure was fraudulent and for the purpose of evading payment.

(f) *Refunds and credits.*—Where there has been an overpayment of tax under this section any refund or credit made under the provisions of section 322 shall be made to the withholding agent unless the amount of such tax was actually withheld by the withholding agent.

SEC. 322. REFUNDS AND CREDITS.

(a) *Authorization.*—Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

(b) Limitation on Allowance.—

(1) Period of Limitation.—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) Limit on Amount of Credit or Refund.—The amount of the credit or refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or, if no claim was filed, then during the three years immediately preceding the allowance of the credit or refund.

(c) Effect of Petition to Board.—If the Commissioner has mailed to the taxpayer a notice of deficiency under section 272 (a) and if the taxpayer files a petition with the Board of Tax Appeals within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As to overpayments determined by a decision of the Board which has become final; and

▼

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

(3) As to any amount collected after the period of limitation upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Board which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive.

(d) **Overpayment Found by Board.**—If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer. No such credit or refund shall be made of any portion of the tax unless the Board determines as part of its decision that such portion was paid (1) within three years before the filing of the claim or the filing of the petition, whichever is earlier, or (2) after the mailing of the notice of deficiency.

(e) **Tax Withheld at Source.**—

For refund or credit in case of excessive withholding at the source, see section 143(f).

No. 10,384

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

BANK OF AMERICA, NATIONAL TRUST AND
SAVINGS ASSOCIATION (a national banking
association),

Appellant,

VS.

CLIFFORD C. ANGLIM, United States Col-
lector of Internal Revenue for the First
Collection District of California,

Appellee.

On Appeal from the District Court of the United States for the
Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

SAMUEL O. CLARK, JR.,

Assistant Attorney General of the United States.

SEWALL KEY,

J. LOUIS MONARCH.

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No. 10,384

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BANK OF AMERICA, NATIONAL TRUST AND
SAVINGS ASSOCIATION (a national banking
association),

Appellant,

vs.

CLIFFORD C. ANGLIM, United States Col-
lector of Internal Revenue for the First
Collection District of California,

Appellee.

**On Appeal from the District Court of the United States for the
Northern District of California, Southern Division.**

BRIEF FOR APPELLEE.

OPINION BELOW.

The lower court wrote no opinion.

JURISDICTION.

This is an appeal from the judgment of the United States District Court, Northern District of California, Southern Division, rendered November 6, 1942, in favor of the appellant for \$41.73, plus interest, federal

income taxes for the year 1939, collected and paid by the Bank of America as withholding agent. (R. 43-44.) Appellant instituted the action against the Collector of Internal Revenue for the recovery of \$6,459.02, plus interest, federal income taxes for the years 1938 and 1939, withheld and paid by it as withholding agent on dividends payable to alien nonresident stockholders of the Transamerica Corporation. (R. 2-23.) Appellant filed claims for refund on July 26, 1941. (R. 5, 8-9.) The claims were rejected by the Commissioner on December 17, 1941. (R. 6, 9.) Jurisdiction was vested in the District Court under Section 24, Fifth of the Judicial Code. Notice of appeal was filed on February 2, 1943. (R. 44-45.) No appeal was taken by the appellee. Jurisdiction is conferred upon this Court by Section 128(a) of the Judicial Code, as amended.

QUESTION PRESENTED.

Whether a withholding agent who pursuant to Section 143(b) of the Revenue Act of 1938, and the Internal Revenue Code, withheld and paid income taxes of nonresident alien stockholders of a corporation out of dividends payable to these stockholders and who withheld the taxes paid from the stockholders, may maintain suit to recover the taxes in its own right.

STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. i-ix.

STATEMENT.

The undisputed facts as admitted by the pleadings and found by the court may be briefly summarized as follows:

The Bank of America (hereinafter called the Bank) was the transfer agent of Transamerica Corporation having charge and custody of dividend payments to Transamerica's stockholders. (R. 34-35.) On March 15, 1939, the Bank pursuant to Section 143(b), Revenue Act of 1938, filed a withholding tax return reporting income including dividends payable by Transamerica to its nonresident alien stockholders for the year 1938, and withheld and paid the taxes to the Collector of Internal Revenue. (R. 35.) Included in the taxes withheld and paid was the sum of \$3,189.83 (R. 35) which the Commissioner of Internal Revenue later ruled was not dividend income to the stockholders. (R. 36.)

On March 15, 1940, the Bank filed a withholding tax return reporting similar income including dividends payable by the same corporation to its nonresident alien stockholders for the year 1939, and also withheld and paid taxes on the income to the Collector. (R. 37-38.) The taxes withheld and paid on the dividends to the nonresident alien stockholders aggregated \$3,227.46. (R. 38.) It is admitted by the pleadings that the Commissioner of Internal Revenue later ruled this amount did not constitute dividend income to the stockholders. (R. 8, 27.)

On July 26, 1941, the Bank filed a claim for refund for the tax of \$3,189.83, paid for 1938, attaching

thereto a list of about 1,000 nonresident alien stockholders and setting out their names and addresses and the amounts of taxes withheld from each stockholder. (R. 36). On December 17, 1941, the Commissioner rejected the claim for the following reason (R. 37):

As the tax involved was actually withheld by you from the income paid to the non-resident foreign persons, any excess amounts withheld are refundable only to those recipients upon showing that the amounts withheld were in excess of any properly due for the taxable year. For this reason your claims will be rejected.

On July 26, 1941, the Bank filed a claim for refund of the tax of \$3,227.46 paid for 1939, which claim was similar in form to its claim for the year 1938. (R. 38.) On December 17, 1941, the Commissioner rejected this claim for the same reason the claim for 1938 was rejected. (R. 38.)

The Bank withheld taxes from nonresident alien stockholders on dividends paid in 1937 and filed a claim for refund for these taxes which was allowed and the amounts claimed refunded. The Bank thereupon paid the amounts refunded to such stockholders as it could locate and credited the accounts to those to whom checks could not be transmitted. (R. 39.)

After the refund claims for 1938 and 1939 were filed, the Bank set up on its records what it designated as "memorandum credit cards" showing as to each person listed in the refund claims a credit for the amount of the tax for which refund was being claimed for his account. This credit was set up by the Bank only on

subsidiary card records and was considered as a contingent credit which would be transferred to the actual liability accounts of the Bank when and if the refund claims were finally allowed, it being the Bank's purpose and intention to handle any refunds of taxes for 1938 and 1939 in the same manner it handled the 1937 refunds. (R. 39-40.)

SUMMARY OF ARGUMENT.

The Bank did not pay the taxes out of its own funds but withheld them from dividends payable to stockholders of Transamerica. The taxes withheld and paid have never been paid to the stockholders. The Bank has withheld these taxes from the stockholders and not having borne the burden of the tax is not entitled to recover under Section 143(f), Revenue Act of 1938, and the Internal Revenue Code. The taxes involved would be refundable only to the alien stockholders providing they file proper and timely claims for refund and make a showing that the Government is indebted to them upon an audit of their tax liability for the years involved. The provisions of Section 143(f) bar recovery by the Bank in a suit either against the Collector or the United States.

ARGUMENT.**THE BANK HAS NO RIGHT TO THE REFUNDS BECAUSE IT
WITHHELD THE TAXES FROM THE STOCKHOLDERS.**

The Bank withheld 10% of dividends payable to nonresident alien stockholders of the Transamerica Corporation and paid the amounts withheld to the Collector in compliance with Section 143(d), Revenue Act of 1938, and the Internal Revenue Code. (Appendix, *infra*.) The Commissioner later ruled the dividends were not taxable income. Appellant then filed claims for refund in its own name which were rejected. Appellant now seeks to recover the taxes erroneously paid, in its own right and in its own name. The undisputed evidence shows the taxes were withheld by the Bank from the stockholders and that the stockholders and not the Bank bore the tax burden. It is our position that under Section 143(f), appellant had no right to recover because it withheld the taxes from the stockholders. Section 143(f) provides:

REFUNDS AND CREDITS.—Where there has been an overpayment of tax under this section any refund or credit made under the provisions of section 322 shall be made to the withholding agent unless the amount of such tax was actually withheld by the withholding agent.

This section plainly means that refunds shall not be made to the withholding agent where he withholds the taxes from the primary taxpayers. *Pauker v. United States*, 23 F. Supp. 821 (S.D.N.Y.); *Capital Estates, Inc. v. Commissioner*, 46 B. T. A. 986, on appeal to the Circuit Court of Appeals for the Third Circuit.

In the *Pauker* case, *supra*, the court held under provisions of the Revenue Acts of 1934 and 1936, identical with those here involved, that a withholding agent was not entitled to recover where it withheld the tax from the recipients of the income. The court stated (pp. 822-823) :

I think that it is clear that the words "unless the amount of such tax was actually withheld by the withholding agent" mean withheld from the recipient of the income (in this case the foreign authors and publishers). There being no ambiguity, then upon what basis may the petitioner maintain this suit? * * *

* * * * *

At bar, I find no statutory authority which would enable the petitioner, as withholding agent, to maintain this suit, nor does there appear from the petition any authority by the foreign authors and publishers to do so.

If what has already been said is not conclusive to defeat the petitioner's right to maintain this action, another ground looms large to the court sufficient to call for the dismissal of the petition. The possibility of subjecting the government to a double liability should defeat the petitioner's right to maintain this action in the absence of a specific statutory authority or some authorization from his principal to sue. If the petitioner were to prevail against the government in this suit, what safeguard would there be against a subsequent suit by the foreign authors and publishers for the same relief? The answer is self-evident. Neither is the court impressed with the argument that no claim for refund by the foreign authors

and publishers has been made in this case. There is still the possibility of such action on their part in some forum for the identical relief sought here.

Similarly, in the *Capital Estates, Inc.* case, *supra*, it was held that a withholding agent who had withheld the taxes from the primary taxpayer was not entitled to offset an overpayment against its own tax liability.

The appellant mistakenly relies on the case of *Houston Street Corp. v. Commissioner*, 84 F. (2d) 821 (C.C.A. 5th). In that case there had been a failure to withhold and the Commissioner made a jeopardy assessment under Section 143(c) of the applicable Revenue Act. The withholding agent filed a petition with the Board of Tax Appeals for a redetermination of the deficiency, and the question involved was whether the petitioner was the taxpayer and therefore entitled to file a petition before the Board. Since it had not withheld the tax, the statute made the agent itself liable for the tax. Accordingly the court held the agent was "subject to a tax" and entitled to file a petition before the Board. Where, as here, the tax has been withheld and the Commissioner has asserted no claim against the agent, the reasoning of the *Houston* case is inapplicable.

Appellant does not claim an assignment of the claims for refund of the stockholders. If the claims had been assigned before their allowance, such assignment would be void under Section 3477, Revised Statutes. *Hager v. Swayne*, 149 U. S. 242; *Goodman v. Niblack*, 102 U. S. 555. The Bank is clearly not

entitled to the taxes in its own right. It does not allege or prove authority to sue as agent for the stockholders and generally there would be no legal basis for a suit of that character in its name.

On pages 18-19 of its brief appellant states that the purpose of Section 143(f) is to protect the Government against double liability; that the statute of limitations bars any suits for refunds by the stockholders, and consequently the Government would not be in jeopardy of a double liability if the taxes were paid to the Bank. There is nothing in the record showing that the time for filing suits for refund has expired as to any or all of the stockholders. There were about a thousand stockholders and for all the record shows some of them may have filed claims for refund which are still pending before the Commissioner or may be in litigation. The stockholders may have collected their share of the taxes paid. If, as appellant urges, the statute of limitations bars recovery of the taxes by the stockholders, we answer that there is no legal authority for them to indirectly collect barred taxes through appellant as their agent where collection by them in their own names would be prohibited by law on account of the statute of limitations.

The income upon which the tax is levied is the income of the stockholders under Section 143(d). Before any stockholder can recover he must show not only that the amounts withheld were erroneously paid, but that he overpaid his taxes for the year involved. The Commissioner has the right upon a re-audit of the liability of every taxpayer to withhold a refund

unless the tax for the year involved has been paid. *Lewis v. Reynolds*, 284 U. S. 281. In that case, which was a suit for refund against a Collector of Internal Revenue, the Supreme Court quoted with approval the opinion of the Circuit Court of Appeals (p. 283):

“The action to recover on a claim for refund is in the nature of an action for money had and received, and it is incumbent upon the claimant to show that the United States has money which belongs to him.”

The Court held an overpayment of taxes must appear before there could be a recovery and that has not been shown in the case at bar. There is no legal significance to the statements made by appellant in its brief (p. 18), that it has committed itself to pay any amounts it recovers to the stockholders. Actions to recover taxes must be brought in the name of the party entitled to recover the same and the plaintiff in a suit for refund must establish his right to recover not the right of a third party.

Appellant urges in its brief (pp. 13-16) that since this suit is against the Collector of Internal Revenue it can be maintained even though the suit might not have been proper if brought against the United States. The argument is premised on the ground the sovereign was not sued and that this is a common law action against the Collector which does not require his consent. The only authorities cited in support of this proposition are *United States v. Kales*, 314 U. S. 186; *Sage v. United States*, 250 U. S. 33; *United States v. Nunnally Investment Co.*, 316 U. S. 258; *Smietanka v.*

Indiana Steel Co., 257 U. S. 1. These cases hold that technically the United States is not a party to a suit instituted against the Collector of Internal Revenue, even though the United States actually pays any judgment rendered. Therefore it was held that a judgment against a Collector is not *res judicata* in a suit against the United States.¹

Those cases do not indicate that a taxpayer may avoid the plain provisions of the Revenue Acts through a suit against the Collector. While it is an alternative remedy, a Collector suit is subject to the same defenses as a suit against the United States. See *United States v. Jefferson Electric Co.*, 291 U. S. 386, 403.

It is well settled that the same prerequisites in the way of filing proper claims for refund must be met whether the suit is against the United States or the Collector. *Tucker v. Alexander*, 275 U. S. 228; *United States v. Felt & Tarrant Co.*, 283 U. S. 269. One of the requirements is that the claimant should show an overpayment of his tax. There is no averment in the claims for refund or the pleadings that the Bank's income taxes for 1938 and 1939 were overpaid. Failure to show that would defeat a recovery even if the Bank had not withheld the taxes from the stockholders.

A tax withheld at the source "is deemed to have been paid by the persons ultimately liable for the tax * * *." Article 143-9, Treasury Regulations 101, *infra*.

¹Section 3772 (d), Internal Revenue Code (Appendix, *infra*, p. i) has abrogated this rule insofar as suits instituted after June 15, 1942, are concerned.

Here the tax was withheld and thus the appellant occupies the status of a tax collector, rather than that of a taxpayer. The statute imposes a *tax* liability on a withholding agent only where he fails to withhold. That was the situation in *Houston Street Corp. v. Commissioner, supra*. But having withheld the tax and assumed the status of a tax collector, appellant was required to pay the money over to the United States, and now has no more standing to claim a refund than any other tax collector. As a mere agent appellant has no interest which can be adverse to the United States or to Collector Anglim.

Partly upon the recognition of the soundness of the principle that a mere collecting agent cannot be hurt by collecting and paying over the tax, and thus has no standing to sue for recovery, the Supreme Court held in *Allen v. Regents*, 304 U. S. 439, 448, 449, that a bill in equity would lie to test *inter alia* the authority of the United States to require state officers to collect federal taxes.

The agency relationship of appellant is further disclosed by Section 3661 of the Internal Revenue Code. (U.S.C. 1940 ed., Title 26, Sec. 3661.) It provides as follows:

Whenever any person is required to collect or withhold any internal-revenue tax from any other person and to pay such tax over to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner

and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.

Since it appears that the money withheld and paid over to the Collector was a "special fund in trust for the United States," it is clear that the money sought to be recovered did not belong to the appellant. Thus, entirely apart from Section 143(f), we submit that appellant has no standing to maintain this suit.

Appellant's insistence upon the point that this is a personal action against the Collector does not advance its position. Such an action is governed by the broadest equitable principles and consideration of abstract justice. It is settled that a refund will be denied to one not entitled in equity and good conscience to receive it. *United States ex rel. Girard Co. v. Helvering*, 301 U. S. 540, 542; *Stone v. White*, 301 U. S. 532, 534-536; *Bull v. United States*, 295 U. S. 247, 261-262; *Lewis v. Reynolds*, *supra*. In the absence of a statute, refund of a tax has been denied on the ground that the plaintiff who has shifted the burden of the tax does not come into equity with clean hands. *Richards Lubricating Co. v. Kinney*, 337 Ill. 122; *Standard Oil Co. v. Bollinger*, 337 Ill. 353.

In the light of the admitted fact that appellant has not borne the burden of the tax, these well-settled equitable principles defeat its right to recover.

CONCLUSION.

We therefore respectfully contend that the judgment should be affirmed.

Dated, June 9, 1943.

Respectfully submitted,

SAMUEL O. CLARK, JR.,

Assistant Attorney General of the United States,

SEWALL KEY,

J. LOUIS MONARCH,

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Special Assistants to the Attorney General of the United States,

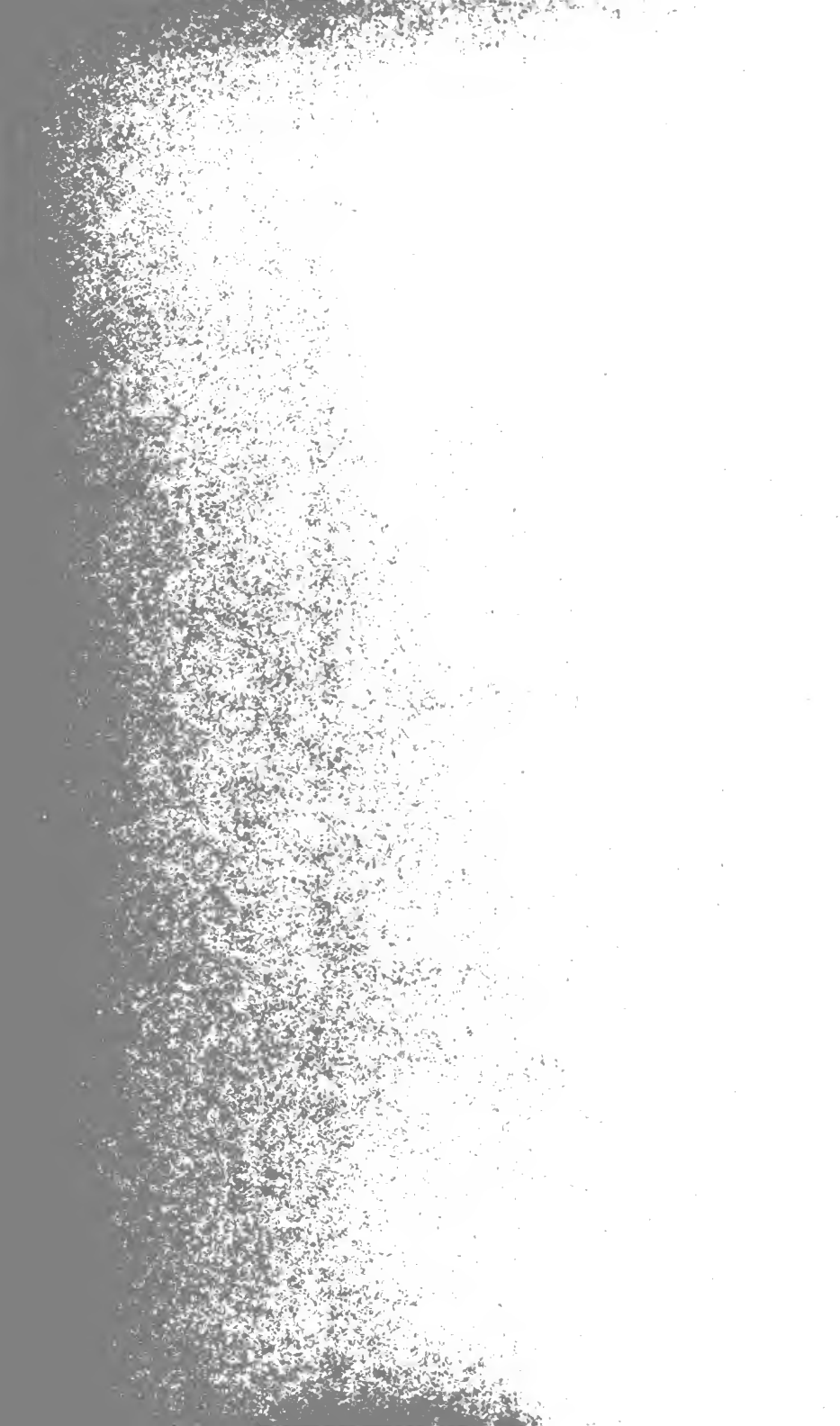
FRANK J. HENNESSY,

United States Attorney,

Attorneys for Appellee.

(Appendix Follows.)

Appendix.



Appendix

Internal Revenue Code:

CHAPTER 37—ABATEMENTS, CREDITS AND REFUNDS

SEC. 3772. SUITS FOR REFUND [As amended by Sec. 503 of the Revenue Act of 1942, Public Law 753, 77th Cong., 2d Sess.]

(a) *Limitations.*

(1) *Claim.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

(2) *Time.*—No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates. (U.S.C. 1940 ed., Title 26, Sec. 3672.)

Revenue Act of 1938, c. 289, 52 Stat. 447:²

²The corresponding sections of the Internal Revenue Code are similar and therefore not set out.

SEC. 143. WITHHOLDING OF TAX AT SOURCE.

* * * * *

(b) *Nonresident Aliens*.—All persons, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of the United States, having the control, receipt, custody, disposal, or payment of interest (except interest on deposits with persons carrying on the banking business paid to persons not engaged in business in the United States and not having an office or place of business therein), dividends, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income (but only to the extent that any of the above items constitutes gross income from sources within the United States), of any nonresident alien individual, or of any partnership not engaged in trade or business within the United States and not having any office or place of business therein and composed in whole or in part of nonresident aliens, shall (except in the cases provided for in subsection (a) of this section and except as otherwise provided in regulations prescribed by the Commissioner under section 215) deduct and withhold from such annual or periodical gains, profits, and income a tax equal to 10 per centum thereof, except that such rate shall be reduced, in the case of a nonresident alien individual a resident of a contiguous country, to such rate (not less than 5 per centum) as may be provided by treaty with such country: *Provided*, That no such deduction or withholding shall be required in the case of dividends paid by

a foreign corporation unless (1) such corporation is engaged in trade or business within the United States or has an office or place of business therein, and (2) more than 85 per centum of the gross income of such corporation for the three-year period ending with the close of its taxable year preceding the declaration of such dividends (or for such part of such period as the corporation has been in existence) was derived from sources within the United States as determined under the provisions of section 119: *Provided further*, That the Commissioner may authorize such tax to be deducted and withheld from the interest upon any securities the owners of which are not known to the withholding agent. Under regulations prescribed by the Commissioner, with the approval of the Secretary, there may be exempted from such deduction and withholding the compensation for personal services of nonresident alien individuals who enter and leave the United States at frequent intervals.

(c) RETURN AND PAYMENT.—Every person required to deduct and withhold any tax under this section shall make return thereof on or before March 15 of each year and shall on or before June 15, in lieu of the time prescribed in section 56, pay the tax to the official of the United States Government authorized to receive it. Every such person is hereby made liable for such tax and is hereby indemnified against the claims and demands of any person for the amount of any payments made in accordance with the provisions of this section.

(d) INCOME OF RECIPIENT.—Income upon which any tax is required to be withheld at the source under this section shall be included in

the return of the recipient of such income, but any amount of tax so withheld shall be credited against the amount of income tax as computed in such return.

(e) **TAX PAID BY RECIPIENT.**—If any tax required under this section to be deducted and withheld is paid by the recipient of the income, it shall not be recollected from the withholding agent; nor in cases in which the tax is so paid shall any penalty be imposed upon or collected from the recipient of the income or the withholding agent for failure to return or pay the same, unless such failure was fraudulent and for the purpose of evading payment.

(f) **REFUNDS AND CREDITS.**—Where there has been an overpayment of tax under this section any refund or credit made under the provisions of section 322 shall be made to the withholding agent unless the amount of such tax was actually withheld by the withholding agent.

SEC. 322. REFUNDS AND CREDITS.

(a) **AUTHORIZATION.**—Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

(b) LIMITATION ON ALLOWANCE.

(1) **PERIOD OF LIMITATION.**—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the

expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) **LIMIT ON AMOUNT OF CREDIT OR REFUND.**—The amount of the credit or refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or, if no claim was filed, then during the three years immediately preceding the allowance of the credit or refund.

* * * * *

(e) **TAX WITHHELD AT SOURCE.**—For refund or credit in case of excessive withholding at the source, see section 143(f).

Treasury Regulations 101, promulgated under the Revenue Act of 1938:³

ART. 143-1. *Withholding tax at source.*—(a) *Withholding in general.*—Withholding of a tax of 10 percent is required in the case of fixed or determinable annual or periodical income paid to a nonresident alien individual (even though such individual is engaged in trade or business within the United States or has an office or place of business therein) or to a nonresident partnership, composed in whole or in part of nonresident alien individuals, except (1) income from sources without the United States, including interest on deposits with persons carrying on the banking busi-

³The corresponding provisions of Regulations 103, promulgated under the Internal Revenue Code, are similar and therefore not set out.

ness paid to persons not engaged in business in the United States and not having any office or place of business therein, (2) interest upon bonds or other obligations of a corporation containing a tax-free covenant and issued before January 1, 1934 (but see paragraph (b) of this article), (3) dividends paid by a foreign corporation unless (A) such corporation is engaged in trade or business within the United States or has an office or place of business therein, and (B) more than 85 percent of the gross income of such corporation for the 3-year period ending with the close of its taxable year preceding the declaration of such dividends (or for such part of such period as the corporation has been in existence) was derived from sources within the United States, as determined under the provisions of section 119, (4) dividends distributed by a corporation organized under the China Trade Act, 1922, to a resident of China, and (5) except that such rate of 10 percent shall be reduced, in the case of a resident of a contiguous country, to such rate, not less than 5 percent, as may be provided by treaty with such country. Under the regulations prescribed pursuant to the tax convention between the United States and Canada, the rate of tax to be withheld at the source has been reduced to 5 percent in the case of residents of Canada. (See page 668 of the Appendix to these regulations.)

The tax must be withheld at the source from the gross amount of any distribution made by a corporation, other than a nontaxable distribution payable in stock or stock rights or a distribution in partial or complete liquidation, without regard to any claim that all or a portion of such distribution is not taxable. Appropriate adjustments,

if any, will be made upon the filing of claims for refund.

* * * * *

ART. 143-9. *Return of income from which tax was withheld.*—The entire amount of the income from which the tax was withheld shall be included in gross income in the return required to be made by the recipient of the income without deduction for such payment of the tax but any tax so withheld shall be credited against the total income tax as computed in the taxpayer's return. (See, however, article 142-5.) If the tax is paid by the recipient of the income or by the withholding agent it shall not be re-collected from the other, regardless of the original liability therefor, and in such event no penalty will be asserted against either person for failure to return or pay the tax where no fraud or purpose to evade payment is involved.

Tax withheld at the source upon fixed or determinable annual or periodical income paid to non-resident alien fiduciaries is deemed to have been paid by the persons ultimately liable for the tax upon such income. Accordingly, if a person is subject to the taxes imposed by sections 11, 12, 13, or 14, upon any portion of the income of a nonresident alien estate or trust, the part of any tax withheld at the source which is properly allocable to the income so taxed to such person shall be credited against the amount of the income tax computed upon his return, and any excess shall be credited against any income, war-profits, or excess-profits tax, or installment thereof, then due from such person, and any balance shall be refunded.

ART. 322-2. *Credit and refund adjustments.*—Overassessments and overpayments of income taxes will be adjusted by means of certificates of overassessment. Credit or refunds of overpayments on the basis of such certificates of overassessment may not be allowed or made, however, after the expiration of the statutory period of limitation properly applicable unless prior to the expiration of such period a claim therefor on Form 843 has been filed by the taxpayer. The claim, together with appropriate supporting evidence, must be filed in the office of the collector for the district in which the tax was paid. Where an amount of tax in excess of that properly due has been paid by a withholding agent, the credit or refund of such excess amount shall be made to the withholding agent unless the amount of such tax was actually withheld by the withholding agent. (See section 143 (f).) As to interest in case of credits or refunds, see section 614 of the Revenue Act of 1928, as amended by section 804 of the Revenue Act of 1936 (paragraph 42 of the Appendix to these regulations), and section 177, United States Judicial Code, as amended by section 615 of the Revenue Act of 1928 and section 808 of the Revenue Act of 1936 (paragraph 43 of the Appendix to these regulations).

ART. 322-3. *Claims for refund by taxpayers.*—Claims by the taxpayer for the refunding of taxes, interest, penalties and additions to tax erroneously or illegally collected shall be made on Form 843, and should be filed with the collector of internal revenue. A separate claim on such form shall be made for each taxable year or period.

The claim must set forth in detail and under oath each ground upon which a refund is claimed,

and facts sufficient to apprise the Commissioner of the exact basis thereof. No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim thereof except upon one or more of the grounds set forth in a claim filed prior to the expiration of such period. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund. With respect to limitations upon the refunding or crediting of taxes, see article 322-7.



No. 10,384

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

BANK OF AMERICA, NATIONAL TRUST AND
SAVINGS ASSOCIATION (a national banking
association),

Appellant,

VS.

CLIFFORD C. ANGLIM, United States Col-
lector of Internal Revenue for the First
Collection District of California,

Appellee.

APPELLANT'S REPLY BRIEF.

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FILED

JUN 18 1943

PAUL P. O'BRIEN,
CLERK

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BANK OF AMERICA, NATIONAL TRUST AND
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vs.

CLIFFORD C. ANGLIM, United States Col-
lector of Internal Revenue for the First
Collection District of California,

Appellee.

APPELLANT'S REPLY BRIEF.

In support of the decision below appellee argues:

(1) That with regard to the taxes in question, appellant is not the taxpayer but is merely a tax collector.

(2) That recovery by appellant is forbidden by Section 143(f) of the Revenue Act of 1938 and Section 143(f) of the Internal Revenue Code.

(3) That appellant has not established an overpayment of tax that can be recovered.

1. APPELLANT IS THE TAXPAYER.

Appellee argues that a withholding agent who withholds is not a taxpayer but cites no authority which supports such contention. *Houston Street Corp. v. Commissioner* (5 Cir. 1936), 84 F(2d) 821, specifically held that a withholding agent was a taxpayer. *Capital Estates, Inc. v. Commissioner*, 46 BTA 986, apparently recognized the withholding agent as a taxpayer for it is only a taxpayer who is entitled to a hearing before the Board of Tax Appeals. (Internal Revenue Code, Section 272.) *Pauker v. United States* (D.C.N.Y. 1938), 23 F. Supp. 821, held that Section 143(f) prohibited recovery by a withholding agent.

“Taxpayer” is defined by the law as “any person subject to the tax”. (Section 901(a)(14), Revenue Act of 1938; Section 3797(a)(14), Internal Revenue Code.) Under Section 143 which provides for and requires withholding, the withholding agent is clearly and definitely made liable for the tax and is the only person who is made liable for the tax. The law does not purport to make the withholding agent liable for a penalty for failure to withhold as would be the case if the withholding agent was merely acting as an agent for the collection of the tax. See Section 143(c), Internal Revenue Code.

The Commissioner of Internal Revenue recognizes a withholding agent as the taxpayer when he assesses a deficiency against him for as stated above there appears to be no authority for such assessment of a deficiency against a withholding agent unless he is the taxpayer. (Section 272, Internal Revenue Code.)

Appellee seems to suggest that a withholding agent is not the taxpayer unless he fails to withhold and the Commissioner asserts a deficiency against him, at which time he becomes the taxpayer. No such distinction is made or justified by the law. The law specifically makes the withholding agent liable for the tax without qualification and without regard to whether he has withheld the amount of the tax.

A similar situation exists in the case of certain other taxes such as the excise tax on club dues. The club is required to collect the taxes from its members and pay them over to the government. In such cases where a club has brought suit to recover the taxes it has been contended by the United States that since the club had not borne the burden of the taxes it was not the taxpayer and was not entitled to recover. The Court of Claims has held that a club which is required to collect and pay the tax is the taxpayer and is entitled to recover any overpayment regardless of the fact that it did not bear the burden of the tax.

Builders Club of Chicago v. United States (Ct. Cls. 1936), 14 F. Supp. 1020;

Alliance Country Club v. United States, 62 Ct. Cl. 579.

The Court of Claims stated that such a club was not a mere collecting agent for the United States. See also *United States v. Johnston*, 268 U.S. 220, 45 S. Ct. 496.

Since the nonresident alien generally bears the burden of such taxes and may pay the tax direct and receive a credit for such taxes, it may be that he may

also be considered the taxpayer with regard to these taxes. It is not unusual for two or more persons to be liable for the payment of a single tax. In such cases all parties liable for the tax are taxpayers.

Regulations 71 (Relating to Stamp Taxes), Section 113.2;

Raybestos-Manhattan Inc. v. United States (1935), 296 U.S. 60, 56 S. Ct. 63;

Standard Oil Co. of California v. United States (9 Cir. 1937), 90 F(2d) 157.

It is submitted that appellant was the person liable for the payment of the taxes in question and was the taxpayer with regard thereto.

**2. SECTION 143(f) DOES NOT FORBID REFUND
TO APPELLANT.**

Section 322 of the Internal Revenue Code authorizes the refund of any overpayment of tax to the taxpayer, provided certain procedural requirements such as the filing a claim are complied with. Said section makes no requirement with regard to the taxpayer having borne the burden of the tax. Unless there is some other restriction appellant as the taxpayer was entitled under Section 322 to recover the overpayment of taxes.

Appellee contends that Section 143(f) prohibits the refund of the overpayment to appellant. Section 143(f) provides:

“Refunds and Credits. Where there has been an overpayment of tax under this section any refund or credit made under the provisions of Section 322

shall be made to the withholding agent unless the amount of such tax was actually withheld by the withholding agent."

In the first place it should be noted that Section 143(f) recognizes the withholding agent as the taxpayer for Section 322 authorizes refunds only to taxpayers. Secondly, Section 143(f) does not prohibit the making of a refund to a withholding agent but on the contrary specifically requires that any refund of any overpayment of a tax under Section 143 be made to the withholding agent unless the tax was withheld. The law does not state to whom the refund should be made if the tax was withheld. Since the tax was withheld in this case, Section 143 does not *require* refund to the withholding agent and the person entitled to the refund must be determined from Section 322.

As pointed out above Section 322 authorizes the refund of overpayments to the "taxpayer" and that term at least includes the withholding agent who was made liable for the tax and who paid the tax to the Collector of Internal Revenue.

Builders Club of Chicago v. United States (Ct. Cl. 1936), 14 F. Supp. 1070;

Alliance Country Club v. United States, 62 Ct. Cl. 579.

It is only by a negative inference that appellee reaches the conclusion that Section 143(f) prohibits the refund to a withholding agent who has withheld.

Had Congress intended to prohibit the refund to the withholding agent as appellee contends, it most cer-

tainly would have specifically so provided as it has done in other similar situations such as the Victory Tax (see Section 466(f), Internal Revenue Code, as amended by Revenue Act of 1942), or would have imposed some specific requirement or restrictions as it has done in the case of the Safe Deposit Tax (Section 1854, Internal Revenue Code), the Retailer's Excise Tax (Section 2407(b), Internal Revenue Code), and the Manufacturer's Excise Tax (Section 3443(d), Internal Revenue Code).

The fact that Congress has specifically provided for the refund to or the protection of the persons who bore the burden of a tax in at least four other sections of the law clearly indicates that Congress did not intend to accomplish the same result by inference from Section 143(f). If Congress had intended to restrict refunds to withholding agents it would have specifically so provided in the law. The failure of Congress to include such a restriction in the law in this instance indicates that it had no such intention.

It is submitted that Section 143(f) does not by its terms forbid a refund to a withholding agent who has withheld but merely requires that the refund be made to the withholding agent where the tax has not been withheld. No doubt the purpose of said provision was to protect the rights of persons who were by law made liable for a tax upon income which did not belong to them and from which they received no benefit. In the absence of such provision the Commissioner might make refunds to nonresident aliens and the withholding agent would be required to seek recovery from the

nonresidents in the Courts of foreign lands. If on the other hand a refund was made to a withholding agent who had previously withheld the tax, if the withholding agent did not voluntarily reimburse the person from whom the tax had been withheld such person could recover by action in a proper Court in the United States.

The Commissioner has on other occasions acted in accordance with appellant's interpretation of Section 143(f) and has refunded overpayments of withheld taxes to appellant upon appellant's claim for refund. (R. 39.) In such instances appellant has paid over the recovery to the persons from whom the taxes were withheld. (R. 39.) In the present case appellant has definitely and repeatedly committed itself to immediately pay over to the nonresident aliens any taxes recovered by it in this action, in the same manner it has followed in the case of previous recoveries. (R. 39-40.)

It is respectfully submitted that appellee and the Court below have misinterpreted Section 143(f) and that that section does not forbid the refund of overpayments of taxes under Section 143 to a withholding agent who did withhold the tax.

**3. APPELLANT HAS ESTABLISHED AN OVERPAYMENT
WHICH SHOULD BE REFUNDED.**

Appellee contends that appellant has not established overpayment of the taxes sought to be recovered in that it has not shown that the individuals from whom

taxes were withheld overpaid their taxes and have not filed claims for refund. Before considering the merits of this contention, appellant desires to point out that such defense is not timely presented. While it is true that the Commissioner or a Collector of Internal Revenue may raise matters not covered by the claim for refund as an affirmative defense such matters must be timely asserted and cannot be raised for the first time in the Appellate Court.

If taxes due from the alien individuals have not been fully paid or if any of them have filed claims for refund, those facts are peculiarly within the knowledge of the appellee, and should have been raised by him in the Court below. While the burden of proof is on the taxpayer seeking a refund of taxes he is not required to anticipate and negative every possible defense.

In this regard the Circuit Court of Appeals for the Sixth Circuit made the following statement in *Routzahn v. Brown*, 95 F(2d) 766, 770:

“It is said that under the broad language of *Lewis v. Reynolds*, supra, the burden is upon the taxpayer to show that he has overpaid the tax legally due, and if not the government may retain payments already received when they do not exceed the amount which might have been properly assessed. Even so, this cannot mean that the taxpayer must in the first instance anticipate all possible claims of tax liability that may at any time be asserted by the collector, and by allegation and proof negative them all, or fail to make his case. This would place a burden upon a taxpayer seeking to recover an overpayment impossible

ever for him to carry. It is implicit in his claim for refund and his declaration of overpayment in suit, each denying the validity of the only asserted basis for the deficiency, that there is no other tax liability in derogation of his right to recover. He has done all within his power to frame issues to the end that decision will forever end the controversy. Affirmation of other grounds of liability is the responsibility of the defendant, and his also the responsibility if in the first trial all dispute is not terminated. Contemplation of the possibilities presented by present circumstances must demonstrate the point. Assuming that upon retrial the collector had asserted but one of his new defenses, that judgment had followed, reversed upon appeal with mandate for new trial, that upon the third trial the collector had again amended, added another distinct defense, and so on ad infinitum, the taxpayer might thus be prevented from ever recovering an overpayment. This cannot be the law."

See also:

Powell v. United States (9 Cir. 1941), 123 F(2d) 472;

United States v. First Wisconsin Trust Co., et al. (7 Cir. 1937), 92 F(2d) 840.

Appellee has not, at any stage of these proceedings, contended or suggested that the taxes in question were legally due from the alien individuals, that any of said taxes have been refunded or that claims for refund have been filed. As such facts would be clearly within the knowledge of appellee, they should have been presented in the Court below if appellee desires to rely

upon such facts as a defense against the refund claimed. It is to be noted that appellee even now does not state that such facts exist but merely alleges that appellee should have proved that they do not exist. Appellant submits that there is no rule in law or equity which requires a plaintiff to anticipate and negative facts which might constitute a defense of set off or equitable recoupment and particularly is that true when the facts are peculiarly within the knowledge of the appellee and the appellee raises no issue with regard thereto.

Powell v. United States (9 Cir. 1941), 123 F(2d) 472;

United States v. First Wisconsin Trust Co., et al. (7 Cir. 1937), 92 F(2d) 840.

The rule contended for by appellee would make it impossible, as a practical matter, for a withholding agent to ever recover an overpayment of taxes paid under Section 143 of the Internal Revenue Code. A withholding agent would not have access to the facts which appellee contends he must prove in order to establish an overpayment. It is not conceivable that Congress intended to give a withholding agent a right to recover overpayments which it would be impossible for him to prove. In all of the cases cited by appellee in support of his contention in this regard the facts established that the government had an equitable claim to the taxes involved which was barred by the statute of limitations. In the present case appellee has not asserted that he or the United States has any equitable right or claim to the taxes paid by appellant.

Furthermore, in the present case the record shows that the period for filing claims for refund has expired. The returns were filed on March 15, 1939 (R. 35), and March 15, 1940 (R. 37). Under the provisions of Section 322 of the Internal Revenue Code the period for filing claims for refund expired for 1938 on March 15, 1942 and expired for 1939 on March 15, 1943. If any claims have been filed or if any refunds have been paid appellee should disclose such facts and not remain silent and demand that appellant prove the absence of such facts.

It is also to be noted that Section 143(f) specifically refers to overpayments of tax under that section. As Section 143 refers only to taxes withheld at source and requires withholding from certain specified payments on the basis of gross income and without regard to deduction or credits, said subsection (f) must have been intended to apply to excessive withholdings and payments which were not required by law. The fact that the withholding agent is made liable for the tax regardless of whether he actually withholds and the reference in Section 143(f) to overpayments of tax under that section indicate that liability of the aliens for tax on other income is not to be considered in determining whether there has been an overpayment under Section 143. Of course no refund would be made to an alien who owes other taxes whether for the year in question or any other year but it is doubtful that the Commissioner would be justified in refusing refund to a withholding agent who had not withheld because the person on whose income the tax was paid owed a tax for the year in which the income was

tion of the rights of the nonresident aliens who due to circumstances over which they have no control have been deprived of money which rightfully belongs to them. Appellant is convinced that it is entitled under the law to recover said overpayments and that it has a moral if not a legal obligation to take the necessary steps to accomplish said recovery. Appellant is willing to consent to any conditions which might be imposed by the Court to assure the payment or credit of any recovery to the persons ultimately entitled thereto.

Appellant respectfully submits that the judgment of the District Court should be reversed and that judgment should be rendered for appellant.

Dated, San Francisco,
June 18, 1943.

Respectfully submitted,

GEORGE H. KOSTER,

BAYLEY KOHLMEIER,

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